Supreme Court, U.S.
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No. 01-___

In The

Supreme Court of the United States

I-125 PROPONENTS' COMMITTEE,

Petitioner,

v.

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU, MONTANA EDUCATION ASSOCIATION, MONTANA MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINE, INC., YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., and NORTHWEST MINING ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JONATHAN R. MOTL
REYNOLDS, MOTL & SHERWOOD, P.L.L.P.
401 N. Last Chance Gulch Rd.
Helena, MT 59601
(406) 442-3261

BRENDA WRIGHT
Counsel of Record
JOHN C. BONIFAZ
BONITA TENNERIELLO
NATIONAL VOTING RIGHTS INSTITUTE
One Bromfield Street
Boston, MA 02108
(617) 368-9100

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether Montana's Initiative 125, which bars corporations from spending general treasury funds to support or oppose ballot measures, but permits such corporate spending from segregated funds raised from employees, members or shareholders of the corporation, is permissible under the First Amendment as a means of protecting the rights of dissenting shareholders and insuring that corporations do not unfairly deploy their unique state-created advantages for political purposes.

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE

Petitioner is the I-125 Proponents' Committee, a political committee formed under the laws of Montana. Pursuant to Rule 29.6, petitioner states that it is not a corporation.

The respondents are the Montana Chamber of Commerce, Sletten Construction, Lehrkind's, Inc., Kalispell Area Chamber of Commerce, Montana Hospital Association, Montana Farm Bureau, Montana Education Association, Montana Mining Association, Communities for a Great Northwest, Golden Sunlight Mine, Inc., Yellow Band Gold, Inc., Continental Lime, Inc., and Northwest Mining Association.

The Montana Commissioner of Political Practices, currently Linda Vaughey, was a defendant-appellant in the court below. Ms. Vaughey has been substituted by operation of law as a party to this action in place of her predecessor in office, Ed Argenbright. Sup. Ct. R. 35.3. The Montana Secretary of State, currently Robert Brown, was an additional defendant-cross-appellant in one of the cases below. Mr. Brown has been substituted by operation of law as a party in place of his predecessor in office, Mike Cooney. *Id.*

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PETITION FOR WRIT OF CERTIORARI

The I-125 Proponents' Committee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-32) is reported at 226 F.3d 1049. The decision of the district court following trial (App. 33-51) is reported at 28 F. Supp. 2d 593. The decision of the district court on cross-motions for summary judgment (App. 54-83) is unreported.

JURISDICTION

The respondents' complaints asserted jurisdiction under 28 U.S.C. § 1331. The district court issued its decision and judgments on November 20, 1998. App. 33-53. Petitioner filed a Notice of Appeal on December 17, 1998. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

The court of appeals issued its decision on September 26, 2000. App. 1-32. Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc on October 10, 2000. The court of appeals entered its order denying the petition for rehearing with suggestion for rehearing en banc on February 20, 2001. App. 84. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Initiative 125 amended Mont. Code Ann. § 13-35-227 as follows (language added by Initiative 125 is in italics):

> **Prohibited contributions from corporations.** (1) (a) *Except as provided in subsection (4),* a corporation may not make a contribution or an expenditure in connection with a candidate, *a ballot issue,* or a political committee that supports or opposes a candidate, *a ballot issue,* or a political party.
>
> *(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.*
>
> (2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).
>
> (3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited

from an individual who is a shareholder, employee, or member of the corporation.

(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

(5) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

STATEMENT OF THE CASE

1. In 1996, the voters of Montana approved Initiative 125 ("I-125"), which regulates the types of funds that corporations may spend on ballot measure campaigns. I-125, codified as Mont. Code Ann. § 13-35-227, is designed to assure that the state-created advantages of the corporate form, which allow corporations to accumulate capital and wield enormous economic power, are not deployed to give corporations an unfair, state-conferred advantage in the political marketplace. To that end, I-125 prohibits the use of corporate general treasury funds in

ballot measure campaigns, while permitting corporations to participate in such campaigns through the use of segregated funds collected from employees, members and shareholders who wish to support the corporation's political activities. Mont. Code Ann. § 13-35-227.

Under I-125, corporations may continue to use their general treasury funds to pay for the administration of the segregated fund, including the expenses involved in publicizing the corporation's views to, and soliciting contributions from, the corporation's employees, members and shareholders. Mont. Code Ann. § 13-35-227(3); *see* Tr. 46, 10/21/98 (Testimony of Raymond Lazuk).[1] Nonprofit corporations formed for the purpose of promoting political ideas are exempt from the restrictions of I-125, so long as they do not engage in business activities, have no for-profit corporate members and no shareholders or other affiliated persons with a claim on the corporation's assets or earnings, and do not accept more than 5% of their annual revenue from for-profit corporations. Mont. Code Ann. § 13-35-227(4)(a)-(d).

I-125 was modeled on the Michigan statute at issue in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in which this Court upheld against First Amendment challenge Michigan's segregated fund requirement for corporate independent expenditures in campaigns for elective office. I-125 also was crafted to comply with this Court's decision in *Federal Election Comm. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*"MCFL"*), which

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[1] "Tr. ___, 00/00/00" refers to the transcript of trial testimony in the district court and the date of the transcript volume. "Ex." refers to the numbered trial exhibits.

held that a segregated fund requirement for corporate independent expenditures could not be applied to a nonprofit corporation formed for the purpose of engaging in political, rather than for-profit, activity. The criteria exempting nonprofit corporations from the limitations in Montana's I-125 track those established in *MCFL*. *Compare* Mont. Code Ann. § 13-35-227(4)(a)-(d) *with MCFL*, 479 U.S. at 264.

2. Prior to I-125's enactment, corporate financing of many ballot measure campaigns in Montana had come to dwarf the contributions of ordinary citizens, despite shareholder opposition to the use of corporate funds for such political purposes. Between 1982 and 1994, nearly three out of every four dollars spent on initiative campaigns in Montana came from corporations and their allied trade associations. C.B. Pearson & Hilary Doyscher, *Big Money and Montana's Ballot Campaigns: A Study of Campaign Contributions to Montana's Ballot Elections from 1982 to 1994*, Ex. 602 at 1, 7. During that period, the largest five corporate contributions combined with the largest five trade association contributions accounted for nearly $2,000,000 in spending on Montana ballot measures, a little less than half of all dollars raised for all ballot measures. *Id.* at 12-13.[2] All of these latter contributions were spent to oppose various initiatives, and all of those initiatives failed. *Id.* In several Montana initiative campaigns, the contributions of the corporate side have amounted to more than 90% – sometimes more than 95%

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[2] A total of approximately $4.7 million was raised for all ballot measure campaigns from 1982 through 1994. Ex. 602 at 12.

– of *all* contributions from *both* sides of the initiative debate.[3]

Massive corporate spending has served to suppress, rather than to promote, a vigorous debate on the merits of Montana ballot measures. For example, a Montana initiative to promote public health by imposing a 25-cent tax on tobacco products, I-115, became the target of a $1.5 million opposition effort funded entirely by contributions from just 16 tobacco companies and their allied trade associations. Documents obtained from the tobacco companies' ad agency showed the agency boasting about using its economic clout with Montana media to suppress "fairness doctrine" television ad time that might otherwise be available to the proponents of I-115. Ex. 525 at 14-1; 19-1. The media clout purchased by the tobacco companies' contributions was even used to suppress standard public service announcements ("P.S.A. spots") that normally aired in Montana as part of the state's public health efforts to discourage smoking. As the ad agency's campaign plan boasted:

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[3]

Initiative	Proponents' Funds	Opponents' Funds	Opponents% of Total
I-87 1980 (bottle bill)	$ 24,422	$ 575,794	95.9%
I-113 1988 (litter control)	$ 54,806	$ 493,339	90.0%
I-115 1990 (tobacco tax)	$ 43,654	$1,583,865	97.3%
I-122 1996 (clean water)	$460,252	$2,336,343	83.5%

Source: Ex. 506; Ex. 602 Appendix C; Ex. 801.

> Bob Henkel and Jerome Anderson were also successful in (1) persuading Montana television stations not to air public service announcements regarding smoking, reasoning that any such activity could influence voters at the polls in the fall, and (2) successfully seeking assurances from the governor's chief of staff that the governor would avoid any further participation in P.S.A. spots for radio and TV on behalf of anti-smoking campaigns[.]

Ex. 525 at 2-3. By the end of the campaign, the massive, one-sided spending had assured, in the words of the tobacco companies' ad agency, that *"[m]ost voters didn't really know what I-115 was all about."* Ex. 531 (emphasis added).

The record further demonstrated that corporate spending in the electoral arena does not reflect shareholder support for the corporation's views. A professional survey of Montana residents showed that owners of corporate shares or mutual funds overwhelmingly believe that corporate spending on initiative campaigns reflects only the views of a few corporate officers rather than the views of shareholders. Ex. 580A at 5. Individual Montana shareholders also testified that their own political beliefs were violated by their corporation's spending on initiative campaigns in Montana. Tr. 645-646 (10/19/98) (Testimony of Tony Jewett); Ex. 736 at 30-31 (Deposition of Joseph M. McNulty) (*see* R. 180).

3. After I-125's enactment in 1996, the Montana Chamber of Commerce, together with other corporations, filed suit on February 14, 1997, challenging the constitutionality of I-125 and seeking declaratory and injunctive

relief. *Montana Chamber of Commerce v. Argenbright*, No. CV-97-6-H-CCL (D. Mont.) (hereafter, *"Chamber"* case). The suit named the Montana Commissioner of Political Practices, then Ed Argenbright, as defendant. (Mr. Argenbright has since been succeeded in that position by Linda Vaughey.) While the case was pending, Initiative I-137, which proposed a ban on new cyanide heap and vat leach open pit gold and silver mines, qualified for the November 1998 ballot. A group of mining companies and their allied trade associations then filed a separate lawsuit on September 1, 1998, alleging that I-125 was unconstitutional as applied to them, and seeking to enjoin the upcoming election on I-137. *Montana Mining Association v. Argenbright*, No. CV-98-37-H-CCL (D. Mont.) (hereafter, *"Montana Mining"* case). The *Montana Mining* case named Mike Cooney, then the Montana Secretary of State, as well as Mr. Argenbright, as defendants. Mike Cooney has since been succeeded in office by Robert Brown.

In both cases, the district court granted leave to intervene to the I-125 Proponents' Committee, a political committee formed to support I-125 pursuant to Mont. Code Ann. § 13-37-201, whose major contributors were the League of Women Voters of Montana, Montana Common Cause, MontPIRG 2030 Fund, and Citizens for I-125.[4]

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[4] Under Mont. Code Ann. § 13-37-210(1), the name of a political committee must identify the interests of its major contributors, and the name of the I-125 Proponents' Committee set forth in its organizational statement includes the major contributors listed above. The I-125 Proponents' Committee therefore has sometimes been referred to in these proceedings as the League of Women Voters of Montana, *et al.*

The district court set the cases for back-to-back trials on the First Amendment claims, beginning with the *Chamber* case.[5] All evidence from the *Chamber* case was admitted as part of the record in the *Montana Mining* case. At the conclusion of the bench trials on October 22, 1998, the district court ruled in favor of the plaintiffs on their First Amendment claim, declaring that I-125 was unconstitutional and enjoining its further enforcement. App. 35. The district court declined to grant the *MMA* plaintiffs' motion for a preliminary injunction against the conduct of the upcoming vote on I-137. *Id.* The district court issued a written decision and judgments reflecting its ruling on November 20, 1998. App. 33-53.

On appeal, a divided panel of the Ninth Circuit affirmed, producing three different opinions. App. 1-32. Judge Rymer's opinion was joined by Judge McKeown, who also wrote a separate concurrence. Judge Hawkins dissented.

The majority ruled that the constitutionality of I-125 was controlled by this Court's decision in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which struck down a Massachusetts statute prohibiting corporation contributions in most ballot initiative campaigns. App. 15-20. The majority opinion acknowledged that Montana's I-125 differs in an important respect from the statute struck down in *Bellotti*, because I-125 allows corporations to establish and administer a segregated

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[5] The district court had earlier dismissed, on summary judgment, Due Process and Equal Protection claims raised by plaintiffs in the *Chamber* case. App. 82. The dismissal of those claims was not appealed to the Ninth Circuit.

fund for ballot issue campaigns, while the Massachusetts statute at issue in *Bellotti* completely banned corporate participation. App. 19. The majority reasoned, however, that because *Bellotti* had not been overruled by this Court, it was "still good law, and controls[ ]" the constitutionality of I-125. App. 20.[6]

Judge McKeown joined the majority opinion, but wrote separately "to underscore that First Amendment protection of political contributions is not absolute[,]" App. 22. Judge McKeown's concurrence also noted that "[l]egitimate policy concerns have prompted legislators to address the power of the corporate contributor." App. 22. Judge McKeown believed, however, that in light of the restrictions of *Bellotti*, "the state failed to sustain its burden of articulating a compelling interest for the restrictions." *Id.*

Judge Hawkins dissented. App. 23-32. He observed that the majority ruling "beg[ged] the question" by stating that the court must follow *Bellotti*. App. 31-32. As Judge Hawkins noted, *Bellotti* is not directly controlling because it did not address the constitutionality of a segregated fund requirement such as I-125's. App. 31-32. This Court's later decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, Judge Hawkins noted, did

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[6] The Ninth Circuit affirmed that portion of the district court's ruling which rejected the request of the Montana Mining Association to enjoin the upcoming vote on I-137 or to set aside the results of the November 1998 election, in which Montana voters approved the enactment of I-137. App. 21-22. This petition addresses only the ruling that I-125 is unconstitutional.

address and uphold the constitutionality of such a provision as applied to corporate independent expenditures. App. 25-27. In doing so, this Court recognized a compelling state interest in preventing corporations from using resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace, an interest equally present when corporations deploy state-created advantages to advance their political views in initiative and referenda elections. App. 25-32.

After *Austin*, " '[t]he conclusion is inescapable that legislatures are now free to restrict corporations to spend only from separate political funds *in ballot measures as well as candidate elections.*' " App. 28 (Hawkins, J., dissenting, *quoting* Gerald G. Ashdown, *Controlling Campaign Spending and the New Corruption: Waiting for the Court*, 44 Vand. L. Rev. 767, 779 (1991) (emphasis added by dissenting opinion)). The segregated fund requirement of Montana's I-125, Judge Hawkins concluded, leaves open a sufficient means for corporate expression, and "is justified by Montana's asserted interest in eliminating what its people have determined to be distorting effects of corporate wealth on the electoral process." App. 32.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN UNSETTLED FIRST AMENDMENT QUESTION OF EXCEPTIONAL IMPORTANCE TO THE INTEGRITY OF STATES' ELECTORAL PROCESSES.

This case squarely presents a question of exceptional importance: whether states may protect corporate

shareholders, and the overall integrity of their political process, by limiting the use of corporate general treasury funds in ballot issue campaigns, and requiring that such expenditures be made instead from segregated funds raised from individual shareholders, employees or members of the corporation. Despite this Court's repeated recognition of "the dangers posed by corporations to the electoral process[,]" *Federal Election Comm. v. National Right to Work Committee*, 459 U.S. 197, 209-10 (1982), the Ninth Circuit's ruling denies Montana the ability to enforce even minimal protections against the misuse of corporations' state-created advantages in the initiative process.

A ruling on the constitutionality of Montana's I-125 under the First Amendment is of great importance not only for the State of Montana, but for the other 25 states across the country (and the District of Columbia) that employ initiatives or referenda. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL 2-3, 51 (1989) (summarizing states that provide for referendum, initiative and/or recall). The distorting effect of corporate political expenditures has dramatically affected the initiative process in many such states,[7] yet the Ninth Circuit majority's ruling is likely to discourage other states from enacting similar, much-needed provisions. It is imperative that states have the ability to protect their democratic processes by enforcing reasonable, carefully drawn limitations such as I-125.

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[7] David R. Lagasee, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 Brook. L. Rev. 1347, 1347-49 (1995).

This Court's 1990 *Austin* decision upheld a similar segregated fund requirement as applied to corporate independent expenditures in campaigns for elective office, expressly relying upon the state interest in limiting

> the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.

494 U.S. at 660. Because the state interests recognized in *Austin* are unrelated to the interest in deterring candidate corruption, but arise instead from the misuse of the corporate form in the political arena, they equally support a restriction on corporate general treasury spending in the initiative context. *See infra* at 14-18.

This Court, however, has yet to address directly the constitutionality of a segregated fund requirement for corporate spending in ballot measure campaigns. Contrary to the holding of the Ninth Circuit majority, *Bellotti* does not resolve this question, because *Bellotti* addressed a statute that entirely banned corporate participation in most initiative campaigns and made no provision for corporate participation through the use of a segregated fund. *See FEC v. MCFL*, 479 U.S. at 259 n.12 (stating that segregated fund requirement "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston v. Bellotti*").

This case, accordingly, presents a timely opportunity for the Court to reconcile *Bellotti*'s rejection of a complete

ban on corporate spending on ballot measures with *Austin*'s approval of a segregated fund requirement for corporate independent expenditures. Indeed, the three-member panel below produced three opinions on how this Court's precedents should apply in determining the constitutionality of I-125, highlighting the need for a definitive ruling by this Court to resolve this question.

The Court should grant review to address the important, unresolved First Amendment question presented by this case.

II. The Ninth Circuit's Invalidation of Montana's I-125 Harms Important State Interests And Conflicts With This Court's First Amendment Analysis in *Austin v. Michigan Chamber of Commerce* and *FEC v. MCFL*.

The Ninth Circuit's invalidation of I-125 disregards the weighty governmental interests that support I-125's restrictions on corporate general treasury spending in the political arena. As the dissenting opinion of Judge Hawkins recognizes, I-125 serves the same compelling interests that this Court recognized in *Austin* and *MCFL*, and is fully constitutional under the First Amendment. This Court should grant review to restore Montana's ability to protect these critical governmental interests.

Corporations, unlike individuals and non-incorporated entities, enjoy state-created rights that enhance their profit-making ability and justify special regulation of their electoral spending. *Austin* explains this as follows: "State law grants corporations special advantages – such as limited liability, perpetual life, and favorable

treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." 494 U.S. at 658-659; *see also MCFL*, 479 U.S. at 258 n.11. For this reason, as noted in *MCFL*:

> [t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

479 U.S. at 258.

The special characteristics of for-profit corporations are critical to the First Amendment analysis of restrictions on corporate spending. In upholding Michigan's segregated fund requirement, the *Austin* Court acknowledged that the independent campaign expenditures regulated by the statute "constitute political expression at the core of our electoral process and of the First Amendment freedoms," 494 U.S. at 657 (citations and internal quotations omitted). The Court nevertheless ruled that Michigan's regulation was fully justified as a means of insuring that corporate wealth is not unfairly deployed for political purposes and of protecting the rights of shareholders who may not subscribe to the corporation's political goals. The Michigan Chamber of Commerce's continued ability to express its views by using segregated funds for

political expenditures rendered the law sufficiently tailored to withstand constitutional scrutiny. 494 U.S. at 660-661.[8]

The same interests that this Court found compelling in *Austin* are served by I-125. A business corporation seeking to control the outcome of a ballot initiative election in Montana enjoys precisely the same state-created advantages that the Court described in *Austin* and *MCFL*. Corporations have no inherent right to the state's assistance in securing an artificial advantage over other speakers in the marketplace of ideas.

Indeed, bestowing such an advantage on corporations is counter to the very purpose for which states have adopted the initiative process. As Chief Justice Rehnquist has pointed out, "Ballot initiatives . . . were a central part of the Progessive movement's agenda for reform at the turn of the 20th century, and were advanced as a means of limiting the control of wealthy special interests and

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[8] *Austin* and *MCFL* are consistent with other decisions recognizing that the unique features of the corporate form justify distinctions between corporations and other entities in campaign finance regulation. *See, e.g., FEC v. National Right to Work Committee*, 459 U.S. at 209-210 (holding that Court would defer to legislative judgment embodied in FECA that unique characteristics of corporations "require particularly careful regulation"); *see also California Medical Association v. Federal Election Comm.*, 453 U.S. 182, 201 (1981) (plurality opinion). Further, Chief Justice Rehnquist has observed that corporations, as creations of the state, need not be endowed by the states with political speech rights under the Fourteenth Amendment. *See First National Bank of Boston v. Bellotti*, 435 U.S. at 825-827 (Rehnquist, J., dissenting).

restoring electoral power to the voters." *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 226-227 (1999) (Rehnquist, C.J., dissenting) (addressing constitutionality of ballot signature regulations). Montana thus has a compelling interest in requiring corporate spending in initiative campaigns to be conducted through segregated funds raised specifically for use in the electoral arena.

Montana's I-125 also protects the political rights of shareholders by assuring that corporate expenditures in the political process are made from funds raised specifically for that purpose. *Cf. MCFL*, 479 U.S. at 258 (noting shareholder protection rationale for segregated fund requirement); *Austin*, 494 U.S. at 659 (same). *See also FEC v. National Right to Work Committee*, 459 U.S. at 207-08 (noting that regulation of corporate solicitations for PAC fund served goal of protecting shareholders whose investments were not made for political purposes).

As noted above, the record contains specific, undisputed testimony by corporate shareholders that their own political beliefs were violated by the corporation's spending on initiative campaigns in Montana, as well as survey evidence demonstrating that owners of corporate shares or mutual funds overwhelmingly believe that corporate spending on initiative campaigns reflects only the views of a few corporate officers rather than the views of shareholders. *See supra* at 7. As *Austin* and *MCFL* recognize, shareholders who disagree with a corporation's political expenditures should not be forced to liquidate their holdings, because they may face serious economic disadvantages for doing so – such as unfavorable market

conditions, tax consequences, or other economic disincentives. *MCFL*, 479 U.S. at 264; *Austin*, 494 U.S. at 663.

The decision of the panel majority, which would establish an insuperable bar to regulations such as I-125, fails to follow the teaching of *Austin* and *MCFL*. The panel majority attempted to distinguish *Austin* by asserting that it turned on "the difference between expenditures for candidate elections and ballot issues." App. 19. But this disregards the critical passage in *Austin* in which this Court *expressly declined* to place any weight on the traditional state interest in protecting candidate elections from the risk of *quid pro quo* financial corruption:

> *Regardless of whether* this danger of "financial *quid pro quo*" corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation *aims at a different type of corruption* in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.

Id. at 659-660 (citations omitted) (emphasis added).

Hence, in *Austin*, this Court recognized a new compelling interest in controlling the distorting effects of corporate wealth on the political process that turns not on the *object* of the spending (candidate elections or referenda), but on the *source* of the spending (corporate general treasury funds not raised for political purposes). As Judge Hawkins' opinion points out, "*Austin* identified a new rationale for limiting corporate campaign spending

that does not turn on whether candidate elections or ballot initiatives are at issue." App. 32.

Contrary to the reasoning of the Ninth Circuit majority, App. 19-20, this case is not controlled by this Court's decision in *First National Bank of Boston v. Bellotti.* Unlike I-125, the statute struck down in *Bellotti* banned *all* corporate spending in initiative elections, and made no provision allowing for corporate expenditures from segregated funds. This Court's 1986 opinion in *FEC v. MCFL* specifically noted that *Bellotti* is inapposite in determining the constitutionality of a segregated fund requirement. 479 U.S. at 259 n.12 (segregated fund requirement "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston v. Bellotti*"); *see also Austin,* 494 U.S. at 660 (observing that Michigan's statute "does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds").[9]

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[9] It bears emphasis that under I-125, corporations are free to spend unlimited amounts raised from shareholders, officers, and employees, with no upper cap on this spending. For decades, corporations have faced this same requirement of using segregated funds (PACs) to contribute to federal elections, *see MCFL,* 479 U.S. at 256-259, yet corporate PAC spending plays a prominent role in federal campaigns, belying any claim that the requirement hobbles corporate expression. *See* LARRY MAKINSON, CENTER FOR RESPONSIVE POLITICS, THE PRICE OF ADMISSION: CAMPAIGN SPENDING IN THE 1992 ELECTIONS (1993) at 15 (documenting dominance of corporate PAC spending over labor and ideological PAC spending).

The Ninth Circuit majority simply ignored extensive and persuasive academic commentary concluding that *Austin*'s rationale authorizes a segregated fund requirement for corporate spending in ballot initiative campaigns. *See* App. 28-29 (dissenting opinion of Judge Hawkins, citing authorities); *see also* Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 Cap. U. L. Rev. 381, 403 n.88 (1992) (noting that *Bellotti* does not bar segregated fund requirement for corporate initiative expenditures in light of *MCFL* and *Austin*); Adam Winkler, *Beyond* Bellotti, 32 Loy. L.A. L. Rev. 133, 172-173 (1998) ("If, however, a state allows unlimited corporate political speech in elections so long as the financing is through segregated funds or PACs, its prohibition on the corporation's use of general treasury funds is constitutional under *Austin*").

The Ninth Circuit majority further erred in its analysis by improperly deferring to district court findings that constituted mixed findings of fact and law and were based on an incorrect understanding of the governing legal principles. The majority stated:

> As there was evidence pointing in each direction, we cannot say the court clearly erred in finding that there was no imminent threat to the democratic process.

App. 20. This deferential review conflicts with this Court's precedents, which require *de novo* review of mixed findings of fact and law, particularly when they involve questions of constitutional law. *See Bose Corp. v. Consumers Unión of the United States*, 466 U.S. 485, 501 (1984). *Compare Cooper Industries, Inc. v. Leatherman Tool*

Group, No. 99-2035, Slip Op. (U.S. May 14, 2001) (reversing Ninth Circuit ruling that failed to apply *de novo* review to district court determination of constitutionality of punitive damages award).[10]

A district court finding that there is no imminent threat to the democratic process that justifies I-125, *see* App. 20, is precisely the type of mixed finding of fact and law to which *de novo* review should apply. Such a conclusion is critically dependent upon a proper assessment of the legal standards that govern the inquiry, including Supreme Court precedent that establishes what does and does not pose a threat to the democratic process for purposes of First Amendment analysis.

Here, the district court findings to which the majority deferred were based on a critically flawed understanding of the governing legal principles. For example, the central premise of the district court's ruling was that "there is no corruption or appearance of corruption in Montana ballot issue elections." App. 46 (relying on testimony of plaintiffs' expert witness). Plaintiffs' expert and the district court, however, equated "corruption" with candidate-related financial improprieties. *See* Tr. 318 (Testimony of Prof. Lopach) ("when an election official is bribed or when a legislator is bought off"); District Court opinion,

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[10] At the beginning of its opinion, the majority recited that the constitutionality of I-125 was determined *de novo*, while district court findings of fact were reviewed for clear error. App. 13. In its actual analysis, however, the majority clearly applied deferential clear error review to the critical legal question of whether corporate general treasury spending posed a threat to the democratic process. App. 20.

App. 43 ("buying or selling votes or tampering with election results"). As already noted (*supra* at 18), this Court specifically rejected such a narrow definition of corruption in *Austin*. 494 U.S. at 659-660. Because it is based on an incorrect legal definition of "corruption," the district court's finding of a lack of harm to the political process in Montana clearly was not entitled to deference.[11]

Finally, petitioner submits that, even if *Bellotti* controlled this case rather than *Austin*, the record is more than adequate to demonstrate corporate dominance of the initiative process that justifies I-125's segregated fund requirement. The record in this case contains specific, concrete evidence of how corporate expenditures have overwhelmed citizen voices in a number of Montana initiative campaigns, and have actively suppressed debate on important issues. *See supra* at 5-7. The district court's findings to the contrary reflect clear error, even assuming *de novo* review were not required.

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[11] Rather than requiring detailed empirical evidence of corporate domination of the process, *Austin* deferred to the legislative judgment that the special benefits conferred by the corporate form "present the *potential* for distorting the political process". 494 U.S. at 661 (emphasis added). *Cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394 (2000) (noting that very fact that public has voted in favor of campaign reform initiative provides evidence of public concern about influence of money in politics). Here, the citizens of Montana expressed their view that corporate spending threatens the democratic process by voting in favor of the enactment of I-125.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BRENDA WRIGHT
Counsel of Record
JOHN C. BONIFAZ
BONITA TENNERIELLO
NATIONAL VOTING RIGHTS INSTITUTE
One Bromfield St., Third Floor
Boston, MA 02108
(617) 368-9100

JONATHAN R. MOTL
REYNOLDS, MOTL & SHERWOOD
401 N. Last Chance Gulch Rd.
Helena, MT 59601
(406) 442-3261

Counsel for Petitioner

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION, *Plaintiffs-Appellees,* v. ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, *Defendant,* and LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125, *Defendant-Intervenor-Appellant.*	No. 98-36256 D.C. No. CV-97-00006-CCL
MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN	No. 98-36257 D.C. No. CV-98-00037-CCL

SUNLIGHT MINES, INC.; YELLOW BAND GOLD, INC.; CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

v.

ED ARGENBRIGHT; MIKE COONEY,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor-Appellant.

MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN SUNLIGHT MINES, INC.; YELLOW BAND GOLD, INC.; CONTINENTAL LIME, INC.,

Plaintiff-Appellees,

v.

ED ARGENBRIGHT

Defendant-Appellant,

and

No. 98-36261

D.C. No. CV-98-00037-CCL

MIKE COONEY,

Defendant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON

Defendant-Intervenor,

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION,

Plaintiffs-Appellees,

v.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant-Appellant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG

No. 98-36266

D.C. No. 97-00006-CCL

2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor.

MONTANA MINING ASSOCIATION,

Plaintiff,

and

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellants,

v.

ED ARGENBRIGHT; MIKE COONEY,

Defendants-Appellees,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE

Intervenor-Appellee.

No. 99-35032

D.C. No. CV-98-00037-CCL

MONTANA MINING ASSOCIATION,

Plaintiff,

and

No. 99-35033

D.C. No. CV-97-00037-CCL

OPINION

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

v.

ED ARGENBRIGHT,

Defendant,

and

MIKE COONEY,

Defendant-Appellant.

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor.

Appeals from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted November 3, 1999
Submission Withdrawn and Deferred November 10, 1999[1]

Resubmitted September 20, 2000
Seattle, Washington
Filed September 26, 2000

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[1] Submission of this case was deferred pending the Supreme Court's decision in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000).

Before: Pamela Ann Rymer, Michael Daly Hawkins, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Rymer;
Concurrence by Judge McKeown;
Dissent by Judge Hawkins

COUNSEL

William Perry Pendley, Mountain States Legal Foundation, Denver, Colorado, for the plaintiffs-appellants.

James M. Scheier, Assistant Attorney General, Helena, Montana, for appellant Ed Argenbright; Daniel J. Whyte, Special Assistant Attorney General, Helena, Montana, for defendant-cross-appellant Michael Cooney.

Brenda Wright, National Voting Rights Institute, Boston, Massachusetts, and Jonathan Motl, Reynolds, Motl and Sherwood, P.L.L.P., Helena, Montana, for defendant-intervenor-appellant League of Women Voters of Montana, Montana Common Cause, MontPirg 2030 Fund and Citizens for I-125.

Stanley T. Kaleczyc and Kimberly A. Beatty, Browning, Kaleczyc, Berry and Hoven, P.C., Helena, Montana, and Stephen A. Bokat, Chamber of Commerce of the United States of America, Washington, D.C., for plaintiff-appellee Montana Chamber of Commerce; Dale R. Cockrell and Steven E. Cummings, Christensen, Moore, Cockrell & Cummings, P.C., Kalispell, Montana, for plaintiffs-appellees Montana Mining Assoc. and Yellow Band Gold, Inc.; Alan L. Joscelyn, Gough, Shanahan, Johnson & Waterman, Helena, Montana, for plaintiff-appellee Golden Sunlight Mines, Inc.

Elizabeth Brenneman, ACLU of Montana, Billings, Montana, for amicus curiae ACLU of Montana.

Karl J. Englund, Jack R. Tuholske, P.C., Missoula, Montana, for amicus curiae Montana Environmental Information Center, Montanans for Common Sense Mining Laws – for I-137, and Montana Council of Trout Unlimited.

OPINION

RYMER, Circuit Judge:

These consolidated appeals involve the initiative process in Montana. Montana state officials and the League of Women Voters appeal the district court's decision, following a bench trial, that Initiative 125 (I-125), which prohibits direct corporate expenditures in ballot initiative campaigns, violates the First Amendment.[2] The Montana Mining Association and various organizations subject to I-125 sought to delay, and then to invalidate,

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[2] The lead plaintiff in the action seeking to invalidate I-125 was the Montana Chamber of Commerce (Chamber). We shall refer to Ed Argenbright, the Commissioner of Political Practices, and other state officials against whom the action was brought as "Montana"; and to organizations led by the League of Women Voters of Montana, which were intervenors in the district court, as "League." Sometimes we shall refer collectively to all parties who support I-125 and seek to have the district court's decision overturned as "I-125 Proponents." Likewise, we shall sometimes refer to those who argue for affirmance as "I-125 Opponents." The ACLU of Montana filed a brief in support of the judgment of the district court holding I-125 unconstitutional.

the election in which voters approved Initiative 137 (I-137) (restricting certain types of mining) on the ground that I-125 unconstitutionally constrained their participation in the election process. They appeal the district court's refusal to do either.[3]

We conclude that the constitutionality of I-125 is controlled by *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and that the district court did not clearly err in its findings that corporate wealth had not distorted the ballot initiative process in Montana, and that in light of those findings, the First Amendment does not permit restricting corporate speech on public issues. Accordingly, we affirm the declaration that I-125 is unconstitutional.

Whether the court should have considered (and granted) MMA's request to delay the I-137 election is moot, and we cannot say that the court erred by later declining to invalidate it. We therefore affirm the judgment in the I-137 appeal as well.

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[3] We shall refer to the parties who sought to enjoin the I-137 election (and who appeal the court's refusal to do so) collectively as "MMA" and to other parties in the same way as in the I-125 appeal. (MMA also sought to have I-125 declared unconstitutional, and its arguments in this connection are treated along with those of the "I-125 Opponents" in the I-125 appeal.) The Montana Environmental Information Center, Montanans for Common Sense Mining Laws – For I-137, and the Montana Council of Trout Unlimited filed an amicus brief in support of affirmance of the district court's refusal to delay or nullify the results of the I-137 election.

I

Montana voters approved I-125 in November 1996. I-125 amended Montana's elections law by prohibiting direct corporate spending in connection with ballot issues.[4] Specifically, the initiative amended the statutory provision concerning "[p]rohibited contributions from

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[4] Section 13-35-227 now reads [I-125 additions underlined]:

(1) *(a) Except as provided in subsection (4)* a corporation may not make a contribution or an expenditure in connection with a candidate, *a ballot issue,* or a political committee which supports or opposes a candidate, *a ballot issue,* or a political party.

(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

corporations." Mont.Code Ann. §§ 13-35-227. Under I-125, corporations (other than non-profit corporations formed for solely political purposes) are prohibited from making a contribution or an expenditure in connection with a ballot issue. Corporations may establish and administer a separate, segregated fund that is allowed to solicit contributions from shareholders, employees, or members of the corporation, but not from the company itself.

The Chamber brought an action in federal district court seeking a declaratory judgment that the initiative was unconstitutional and an injunction restraining its enforcement. The court held on summary judgment that I-125 restricted core political speech, but that a trial was necessary to determine whether a compelling state interest justified the restriction.

Meanwhile, in July 1998, I-137 was certified for the November 1998 ballot. MMA, which opposed I-137, brought suit in September 1998 requesting a preliminary injunction that would either waive I-125 as applied to it, or delay the vote on I-137 until after the I-125 case was resolved. The district court consolidated the two actions.

The I-125 trial focused on the health of the Montana initiative process. I-125 Proponents presented evidence on the effect of corporate money in four unsuccessful Montana initiatives. Witnesses testified that corporate

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(d) does not accept in the aggregate more than 5% annually of its total revenue from (foreign or domestic for-profit corporations),

(5) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

opponents substantially outspent initiative proponents in these races. Advocates for the initiatives testified that they believed the defeats resulted from large corporate expenditures in opposition. Political scientists testified that large scale spending was very effective in initiative campaigns, especially when used in opposition to a ballot issue, and poll results showed that Montanans believe corporations had too much influence in elections. I-125 Opponents, on the other hand, produced evidence that a variety of factors influence election results and that the side spending less money prevailed in 50% of initiative elections. Further, they showed that Montana voter turnout was much higher than the national average, ballot drop-off was low, and the number of ballot issues remained constant over the past 20 years. Finally, I-125 Opponents offered expert testimony that the Montana political system was healthy and free from corruption.

In the I-137 phase, MMA showed that I-125 limited mining companies' ability to oppose I-137 and that I-137 was a significant economic threat to these companies. It also adduced expert testimony that a successful challenge to I-137 was no longer possible, even if the I-125 restriction were lifted, because the I-137 election was only two weeks away. Evidence on the other side showed that the mining companies spent approximately the same amount fighting I-137 as they did in their challenge to the Clean Water Bill, where the I-125 restrictions did not apply.

The district court found the I-125 Opponents' evidence credible and persuasive, accepting their expert's opinion that there is no corruption or appearance of corruption in Montana ballot issue elections. It held that I-125, perhaps facially and certainly as applied, infringes

upon the First Amendment rights of speech and association of those subject to its prohibitions; that it was not narrowly tailored to address only the campaign contributions and expenditures of large corporations; that requiring corporations to fund ballot issue campaign speech through separate, segregated funds (consisting of voluntary contributions from employees, officers, directors, and shareholders) deprives corporations of their ability to communicate political ideas directly to the electorate, which impermissibly chills their speech and association rights and precludes corporations from directly resisting potential laws that could put them out of business; that it prevents the electorate from being exposed to diverse viewpoints on public policy issues; and that the anecdotal evidence presented by I-125 proponents fails to prove that corporations could overwhelm the political speech of individual citizens in Montana to the detriment of the ballot initiative process. Accordingly, the court held, corporations are entitled to defend their economic interests by using the corporate treasury to fund their participation in ballot initiative campaigns. It therefore declared that I-125 is unconstitutional.

In this respect the court ruled in favor of MMA in the I-137 action, but it refused to enjoin the I-137 election on the ground that the relief sought was premature as of the close of evidence, October 22. On November 3, 1998, Montana voters adopted I-137 by a 53% to a 47% margin. MMA then moved to enjoin Montana from validating I-137 by certifying the election results, but the court indicated that it had already ruled and denied the motion.

Both judgments – that I-125 is unconstitutional and that the election in I-137 stands – were appealed.

By the time we heard oral argument in these consolidated appeals, the Supreme Court had granted certiorari in a campaign contribution case, *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 525 U.S. 1121 (1999). We thought it prudent to defer our own decision until the Court had rendered its in *Shrink*. As it turns out, the Court's opinion, *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897 (2000), does not affect the disposition in these appeals.

II

We determine the constitutionality of I-125 de novo. *California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir. 1999), *rev'd on other grounds*, 120 S. Ct. 2402 (2000). The district court's findings of fact are reviewed for clear error. *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1044 (9th Cir. 1999). While we have not previously addressed the question, we agree with other circuits that have considered similar issues that review of the district court's decision not to delay or void the I-137 election should be for abuse of discretion. *Gjersten v. Board of Election Comm'rs*, 791 F.2d 472, 479 (7th Cir. 1986) (decision to invalidate election is reviewed for an abuse of discretion); *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (same).

III

I-125

Montana and League argue that corporations possess unique characteristics and legal advantages that permit them to maximize the accumulation of capital in the economic marketplace. They indicate that I-125 was

designed to assure that corporate participation in ballot initiative campaigns reflects actual public support for the corporation's political views, rather than the sheer economic power that a corporation derives from these state-created advantages. To that end, they point out, I-125 prohibits the use of corporate general treasury funds in ballot issue campaigns, while it permits corporations to participate through the use of segregated funds collected from employees, members and shareholders who wish to support the corporation's political activities. Further, they submit, I-125 is carefully tailored to adhere to the Supreme Court's rulings in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*). They fault the district court's decision on a number of fronts: for failing to recognize the compelling state interests supporting I-125 in that the court believed the only type of corruption that would justify I-125's limits was quid pro quo corruption, whereas in *Austin* the Court declined to rely on that limited anti-corruption rationale; for holding that I-125 could be justified only by evidence that money was the most important variable controlling election outcome in Montana, instead of deferring to the legislative judgement that the special benefit conferred by the corporate form presents the *potential* for distorting the political process; and for finding that voter turnout in Montana is higher than the national average, that I-125 improperly "silences" corporations under *Bellotti* because they retain the right to speak through segregated funds, and that I-125 is unconstitutional even under *Bellotti*.

The Chamber counters that I-125 abridges core First Amendment rights of political speech and association on

issues of public policy. This abridgment of political speech in the context of ballot issue campaigns (by contrast with candidate contributions or expenditures) is contrary to *Bellotti* and unjustified by any compelling state interest. Additionally, the Chamber maintains, there is no evidence of corruption or that corporate contributions or expenditures have reduced voter turnout, caused voter fall-off on the ballot, or been the principal determinant of the outcome of a ballot issue campaign; to the contrary, it submits, the evidence shows that the Montana electoral process is healthy and that the most important factor which influences outcome is the development of a credible, concise and understandable campaign message. Finally, it contends, the use of the segregated fund permitted by I-125 is neither a constitutionally permissible alternative to direct corporate speech nor an effective means to communicate core political speech on public policy issues.

We do not wish to appear to give either position short shrift, because all parties have researched, briefed and argued the issues with exceptional ability and professionalism. Yet as we see it, the constitutionality of I-125 comes down to whether restricting corporate expenditures in the ballot issue process is controlled by *Bellotti*, even though I-125 (unlike the Massachusetts statute at issue in *Bellotti*) permits corporations to establish segregated funds through which others may contribute.

Like this case, *Bellotti* involved a limitation on corporate contributions or expenditures in the ballot issue process (there, in connection with a referendum). A Massachusetts statute prohibited such expenditures "for the purpose of . . . influencing or affecting the vote on

any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation," and further provided that no issue submitted to the voters which solely concerned individual taxation issues could be deemed to affect a corporation's property, business or assets. When a graduated income tax proposal was put on the ballot, several corporate entities wanted to spend money to publicize their views in opposition. Applying strict scrutiny and requiring the state to show both a compelling interest in prohibiting the "exposition of ideas" and narrowly chosen means to avoid unnecessary abridgment, the Court held that the statute must be invalidated. In doing so, it clearly distinguished elections involving *issues* from elections involving *candidates*. As Montana does here, the state argued in *Bellotti* that preserving the integrity of the electoral process, preventing corruption, and sustaining the active involvement of citizens in good government were important state interests that were threatened by corporate participation in discussion of a referendum issue. The Court noted that if the state's

> arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

Bellotti, 435 U.S. at 789-90 (citations omitted). It added:

> Nor are [the state's] arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Id. at 790 (citations omitted).[5] Concluding that the statute prohibited protected speech in a manner unjustified by a compelling state interest, the Court invalidated it.

In *Austin*, the Court considered a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office, but did not prohibit corporations from making

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[5] The Court analogized corporate speech on ballot issues to lobbying by corporations, which the First Amendment protects, *see California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972); *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961), *id.* at 791 n. 31, and noted that "the direct participation of the people in a referendum, if anything, increases the need for the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 790, n. 29 (citations and internal quotes omitted).

such expenditures from segregated funds used solely for political purposes. The Court acknowledged that requiring corporations to make independent political expenditures only through special segregated funds burdens corporate freedom of expression because "the corporation is *not* free to use its general funds for campaign advocacy purposes," *Austin*, 494 U.S. at 658 (quoting *MCFL*, 479 U.S. at 252), but held that the state's rationale in supporting a regulation aimed at "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" was compelling. *Austin*, 494 U.S. at 660. The Court concluded that "the State's decision to regulate only corporations [was] precisely tailored to serve the compelling state interest of eliminating . . . the corrosive effect of political 'war chests.' " *Id.* at 666. It therefore upheld Michigan's restriction on independent corporate expenditures in connection with candidate elections for state office.

Justice Brennan, who concurred in the majority's opinion, wrote separately, distinguishing the particular provisions at issue in *Austin* that prohibit corporations from using treasury funds only for independent expenditures in candidate elections, from the restrictions at issue in *Bellotti*, noting that "[a] corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum." *Id.* at 676 (Brennan, J. concurring). So did Justice Stevens, who observed that, "as we recognized in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978), there is a vast difference between lobbying

and debating public issues on the one hand, and political campaigns for election to public office on the other." *Austin*, 494 U.S. at 678 (Stevens, J., concurring).

Montana and League are correct that I-125 is similar to the statutory scheme approved in *Austin* to the extent that both statutes allow corporations to set up segregated funds. However, as we read the Court's opinions, *Austin* does not turn on this difference from *Bellotti* so much as it does on the difference between expenditures for candidate elections and ballot issues. As the Court explained, in the context of candidate elections, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660. It is also true that the Court indicated in *Bellotti* that through a record or findings, Congress or a state might be able to demonstrate the danger of real or apparent corruption posed by corporate expenditures, 435 U.S. at 787 n. 26 and 789-90, whereas in *Austin* the Court appears to have accepted the state's articulated interest in avoiding corruption without a record or findings, 494 U.S. at 659-60, 666. But again, this appears to reflect the difference between restrictions on the corporate voice in public issue elections, and in partisan candidate elections.

Even if *Austin* may plausibly be read as undermining *Bellotti*, this is for the Supreme Court, not us, to say. As the Court has instructed, " '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' " *Agostini v. Felton*, 521 U.S. 203, 237

(1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). *Austin* cited *Bellotti* and did not overrule it. Therefore, we believe that *Bellotti* is still good law, and controls.

There is no question that a law requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression. *Austin* and *MCFL* so recognize. The burden is even greater when the limitation has to do with independent expenditures in the ballot issue process, as speech on such issues is "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776.

Because the state's interest in preventing corporate wealth from distorting the political process is not obvious or compelling in connection with ballot issue elections, *Bellotti*, 435 U.S. at 789-92, the district court in this case heard considerable evidence, both empirical and expert. It found that "the state has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process." As there was evidence pointing in each direction, we cannot say the court clearly erred in finding that there was no imminent threat to the democratic process.

It follows that I-125 unconstitutionally restricts public discussion in the ballot issue (initiative) process. As the Court concluded in *Bellotti* with respect to the Massachusetts statute, we conclude here that, " '[a] restriction so destructive of the right of public discussion [as I-125], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the

freedoms secured by the First Amendment.' " *Id.* at 792 (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).[6] Its enforcement was, therefore, properly enjoined.

IV

I-137

Having determined that I-125 is unconstitutional, we must decide whether the district court should have delayed or invalidated the I-137 election. Although we have previously held that challenges to election procedures should be made before the election occurs, *see Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1180-81 (9th Cir. 1988) (post-election challenge came too late); *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008 (9th Cir. 1978) (parties must bring complaints forward for preelection adjudication), we have not expressly considered whether it is error for a court to refuse to resolve such challenges on the footing that a pre-election challenge is premature. Nor do we need to do so now, for this issue, together with the question whether MMA's pre-election request for injunctive relief should have been granted, are moot.

This leaves only the question whether the district court erred in refusing to invalidate the election. A state election violates due process "if it is conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*,

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[6] Given this conclusion, we need not reach the question of whether I-125 is "sufficiently tailored" to meet compelling state interests.

140 F.3d 1218, 1226 (9th Cir. 1998). Of course, "the voiding of a state election is a 'drastic if not staggering' remedy." *Soules*, 849 F.2d at 1180 (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967)). In determining whether to void an election, we balance the constitutional violation against the "countervailing equitable factors" such as "the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules*, 849 F.2d at 1180.

Here, even though there was evidence that I-125 had affected MMA's ability to campaign, there was also evidence that it had no substantial impact. Eleven days remained before the election after the district court lifted the I-125 restrictions. And the state has a significant interest in avoiding the costs of a special election. In these circumstances, we cannot say that the district court abused its discretion in failing to void the results of the election.

AFFIRMED.

McKEOWN, Circuit Judge, concurring:

I join in the opinion but write separately to underscore that First Amendment protection of political contributions is not absolute. Here, in light of the specific evidence presented and in light of the requirements of *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the state failed to sustain its burden of articulating a compelling interest for the restrictions. This is not to say, however, that such compelling interests do not exist, even

in the context of initiative elections. The Supreme Court's recent treatment of the evidentiary burden is instructive:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897, 907 (2000). Although *Shrink* concerned candidate elections, its reasoning on judicial scrutiny of state-asserted compelling interests applies with similar force to campaigns for ballot measures.

Legitimate policy concerns have prompted legislators to address the power of the corporate contributor. I believe that a statute may be carefully crafted and tailored to meet a compelling interest in preserving the integrity of the electoral process, such as where contributions so distort the political process that they undermine our democratic system. But that is a case for another day.

HAWKINS, Circuit Judge, dissenting:

We occasionally hear a case falling so squarely between two conflicting Supreme Court opinions that no matter which way we veer, we are likely to run aground. This is one of those cases. With *Bellotti* and *Austin*, the Supreme Court has laid out a difficult course for us to navigate in determining whether restrictions on corporate campaign spending are constitutional. Judge Rymer

works her way admirably through this challenge, but in the end I am not convinced. At the risk of running off course myself, I choose a different line because I think it is more consistent with the development of Supreme Court precedent in this area and reflects a more sensitive understanding of the ways in which corporate spending can distort the electoral process. Although certainly not dispositive, this approach has the added benefit of upholding the expressed discernment of the people of Montana about these matters.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court's first major campaign spending case, the plaintiffs challenged the Federal Election Campaign Act, which placed dollar limits on political contributions to candidates and on individual expenditures "relative to a clearly identified candidate."[1] The Court held that the contribution limits were constitutional because the government has a compelling interest in eliminating corruption (or its appearance) in the electoral process, and the restrictions did not completely preclude individuals or groups from expressing their support of a particular candidate. *See id.* at 26-29. But the limits on individual expenditures were struck down. These restrictions, the Court held, could not

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[1] The Act also limited campaign spending by candidates for various federal offices and spending for national conventions by political parties. It required that contributions and expenditures over a certain amount be reported and publicly disclosed, established a system for funding Presidential elections, and created the Federal Election Commission to monitor and enforce these regulations. *See Buckley*, 424 U.S. at 7.

be justified by the government's interest in battling corruption because independent spending in candidate elections presents little risk of quid pro quo bargaining. *See id.* at 45-47.

Shortly afterward, the Court decided *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which involved a complete ban on corporate spending in referenda campaigns. Here, as in *Buckley*, the government argued that the restriction was justified by its interest in battling corruption and in preserving the integrity of the electoral process. *See id.* at 788-89. The Court disagreed. "Referenda are held on issues, not candidates for public office," the Court stated. *See id.* at 790. And while a candidate may offer political favors in return for campaign contributions, a referendum cannot. As a result, "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Id.*

Buckley and *Bellotti* focused much attention on the government's asserted interest in preventing quid pro quo corruption. Indeed, in a subsequent case, the Court stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

But twelve years after *Bellotti*, the Court was presented with a new asserted interest. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a state statute prohibited corporations from using general treasury

funds to make independent expenditures in candidate elections, but allowed them to set up segregated campaign funds to which employees, shareholders, and members could contribute. *See id.* at 655-56. Because the statute targeted campaign expenditures, not contributions, the state could not justify it as a measure to fight quid pro quo corruption. *See Buckley*, 424 U.S. at 45-47. So instead, the state argued that "the unique legal and economic characteristics of corporations" created the risk of a different kind of corruption not based on political dealmaking.

Four years earlier, the Court had itself identified this "new" form of corruption. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("*MCFL*"), the Court explained that state laws grant corporations special advantages that not only allow them to play a dominant role in the economy, but permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." The Court elaborated:

> The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

Id. at 258.

The Court nonetheless struck down the corporate spending limits in *MCFL* as applied because the plaintiff

was an ideological organization "formed to disseminate political ideas, not to amass capital." *Id.* at 259. But the plaintiff in *Austin*, the Michigan Chamber of Commerce, possessed several characteristics that made it more like a corporation and less like a nonprofit ideological group. *See Austin*, 494 U.S. at 662-665. So the Court applied the analysis it had articulated in *MCFL* to uphold the statute.

Michigan's statute, the Court made clear, did not aim at traditional quid pro quo corruption. *See id.* at 659. It targeted "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. "The unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures," the Court stated. *Id.* "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the state has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations." *Id.*

Austin did not expressly overrule *Bellotti;* in fact, Justice Marshall's opinion remained conspicuously silent about the relevance of its holding for state referenda.[2] But most observers have concluded that the Court's analysis

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[2] The opinion cited *Bellotti* only four times and exclusively on mundane issues.

undermines the distinction between candidate elections and referenda, which was the key to *Bellotti*. Although the traditional quid pro quo corruption may not be a problem in referenda, it is difficult to see why the distorting effects of corporate wealth – the "new corruption," as it has been called – would not be equally problematic in both contexts. Once *Austin* was decided, therefore, the natural conclusion was that a similar restriction on corporate spending in state referenda would be upheld in spite of *Bellotti*. *See* Thomas C. Goldstein, *Corporate Influence in Referenda: A Comment About the Prescription*, 1996 Ann. Surv. Am. L. 469, 473 (1996) (stating that "the Court in *Austin* substantially reversed course from *Bellotti*" and that "the expenditures in *Austin*, which were not coordinated with the candidate, were the rough equivalent of spending in referenda."); James B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 Ann. Surv. Am. L. Rev. 393, 408 (stating that a ban on corporate spending in ballot initiatives is "perfectly congruent with the Court's new and far more nuanced conception of 'corruption' "); Gerald G. Ashdown, *Controlling Campaign Spending and the New Corruption: Waiting for the Court*, 44 Vanderbilt Law Review 767, 779 (1991) ("The conclusion is inescapable that legislatures are now free to restrict corporations to spend only from separate political funds *in ballot measures as well as candidate elections.*") (emphasis added); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 Yale L. & Pol'y Rev. 236, 252 (1991) ("[I]f corruption includes the distorting effects of large amounts of wealth on the political debate, corruption is no less troubling in referenda than in candidate

elections. Thus, this distinction also seems destined to fall in light of the *Austin* Court's redefinition of corruption.").

Judge Rymer resists this conclusion. Although the Montana initiative is identical to the *Austin* statute in that it permits corporations to spend from a segregated fund – something the *Bellotti* statute did not allow – she asserts that the relevant distinction is between laws that regulate spending in candidate elections and laws that target spending in ballot initiatives or referenda. (Majority Op. at 12341). She does not explain how this traditional distinction survives *Austin*'s identification of a new form of corruption unrelated to quid pro quo bargaining. She only quotes *Austin*'s statement that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." (Majority Op. at 12341). This statement, however, does not suggest that corporate wealth plays a greater role in candidate elections than in referenda. It merely describes the effect of corporate wealth in elections generally.

Judge Rymer appears to recognize this difficulty. As a result, she attempts to find support for her position in the concurring opinions of Justices Brennan and Stevens in *Austin*. She suggests that Justice Brennan relied on the same distinction between candidate elections and referenda campaigns that she relies on here. Justice Brennan, she points out, noted that under the *Austin* statute, "a corporation remains free, for example to use general treasury funds to support an initiative proposal in a state referendum." (Majority Op. at 12340). The implication is that Justice Brennan's vote turned on the limited scope of the *Austin* statute.

A closer reading of Justice Brennan's statement undermines this implication. When Justice Brennan made this statement, he was responding to the dissent's claim that the statute was under-inclusive. He first acknowledged that the statute "is concededly under-inclusive insofar as it does not ban other types of political expenditures to which a dissenting . . . . corporate shareholder might object." *Austin*, 494 U.S. at 675-76. He then explained: "The particular provision at issue prohibits corporations from using treasury funds only for making independent expenditures in support of, or in opposition to, any candidate in state elections. A corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum." *Id.* at 676.

The context of Justice Brennan's statement makes clear that he did not think the limited scope of the statute (i.e. that it did not restrict corporate spending in state referenda) was what saved it. In fact, he recognized that the statute's under-inclusiveness was problematic. He then argued that this under-inclusiveness was not fatal because candidate elections are at the heart of political debate and the state can choose to single out corporate spending in that context. *See id.* at 676-77. He never suggested, however, that the state could not go further and limit corporate spending in referenda or ballot initiatives. Nor did he suggest that what distinguished *Austin* from *Bellotti* was that the latter involved referenda. To the contrary, he explained that *Bellotti* was different because it involved a complete ban on corporate spending, while *Austin* allowed for a segregated fund. *See id.* at 670 n. 1 ("In [*MCFL*], we observed that the requirement that

expenditures be made through PACs 'is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in *First National Bank of Boston v. Bellotti.*").

Justice Stevens did distinguish *Bellotti* from *Austin* on the ground that one involved referenda and the other involved candidate elections. *See id.* at 678. But that is because he rejected *Buckley*'s conclusion that restrictions on campaign expenditures were not justified by the government's interest in preventing quid pro quo corruption. *See id.* Therefore, he did not need to rely on the government's new asserted interest – that corporate wealth distorts the electoral process. And because he relied on the traditional corruption rationale, he could make the same distinction the Court made in *Bellotti.* Justice Stevens' views are interesting, but because he was the sixth vote to uphold the statute, they shed little light on the majority's holding.

Finally, Judge Rymer argues that when a Supreme Court opinion directly applies to a case, we must follow it even if the opinion's reasoning was undermined by a later Court decision. (Majority Op. at 12341). This is a serious argument no doubt. *Bellotti* has not been overruled, and the facts of this case are similar to *Bellotti:* both involve restrictions on corporate spending in state referenda. The problem is that while the facts of the two cases are similar, there is also a significant difference. The Montana initiative – like the statute in *Austin* – allows for corporate spending through a segregated fund, while the *Bellotti* statute banned corporate spending entirely. Thus, to say we must follow the case that directly applies begs

the question: which case applies when both share a common and important feature with the case before us? In such a situation, we should not simply assert that one case directly applies and then ignore the other. We must do our best to reconcile the two. And in my opinion, the best way to reconcile these cases is to acknowledge that *Austin* identified a new rationale for limiting corporate campaign spending that does not turn on whether candidate elections or ballot initiatives are at issue. In addition, the statute in *Austin* was less objectionable than the statute in *Bellotti* because it allowed for corporate spending through a segregated fund. Because the initiative also allows for a segregated fund, I think it is justified by Montana's asserted interest in eliminating what its people have determined to be distorting effects of corporate wealth on the electoral process.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

CV 97-6-H-CCL

(Filed Nov. 20, 1998)

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC.,

CV 98-37-H-CCL

YELLOW BAND GOLD, INC. and CONTINENTAL LIME, INC.,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, and MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

OPINION and ORDER

These two cases (hereinafter *Montana Chamber* and *Montana Mining Ass'n*, respectively) seek declaratory judgments and injunctive relief invalidating Initiative 125, and the *Montana Mining Ass'n* suit seeks similar relief as to Initiative 137. The court granted limited consolidation of the two cases by setting down serial trials with both cases to be tried before the court decided either, and with all agreeing that all evidence in the *Montana Chamber* case was also before the court in the *Montana Mining Ass'n* case. The cases came on regularly for trial on the merits on October 13 and October 21, 1998, respectively. In the case of *Montana Mining Ass'n*, a hearing on Plaintiffs' motions for preliminary injunction was merged with the trial.

The court has jurisdiction over both cases pursuant to 28 U.S.C. § 1331 (federal question). Having shown an invasion of a legally protected interest, a causal connection between the injury and the matter complained of, and a likelihood that the injury can be redressed by a favorable decision, *see Lee v. State of Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997), the Plaintiffs in both cases (with one exception) have standing to litigate their complaints. All parties in the *Montana Chamber* case agree that Plaintiff Montana Education Association ("MEA") no longer has standing and ought to be dismissed from the case because the MEA has disincorporated to avoid the restrictions imposed by Initiative 125.

After receiving the evidence in both trials and after considering the arguments of all the parties, the court ruled from the bench on October 22, 1998, finding in favor of the Plaintiffs in both cases as to the unconstitutionality of I-125 but denying the injunction against I-137 sought by the Plaintiffs in the *Montana Mining Ass'n* case. The following opinion explains the court's reasoning and also shall stand for the court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

Background

Since 1975, a total prohibition against all corporate contributions or payments to Montana ballot elections has been considered to be an overbroad, blanket infringement of corporations' First Amendment rights. *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd* 583 F.2d 421 (9th Cir. 1978). In *C & C Plywood*, the circuit panel began its review with the fundamental

proposition that political speech is "at the heart of the First Amendment's protection." *Id.* at 423 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)). In affirming the district court's decision, the circuit panel also relied upon *Bellotti* for the rule that corporate speech is protected by the First Amendment unless a compelling state interest can be shown that justifies the abridgment. *Id.* at 423-25. The panel noted that corruption is not an issue in nonpartisan ballot issue elections (at least in the sense of *quid pro quo* corruption, which is generally defined as an attempt to buy political favors from candidates by individuals or corporations). *Id.* at 425. Thus, from 1975 until 1996 Montana corporations have been permitted to make contributions and expenditures to support or oppose ballot issues in Montana.

In 1996, however, Montana voters approved Initiative 125 ("I-125"), which amends Mont. Code Ann. § 13-35-227 and provides as follows:

> (1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a . . . ballot issue, or a political committee which supports or opposes a . . . ballot issue.
>
> (b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.
>
> . . .
>
> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas, and that:
>
> (a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

The codification of I-125 was itself amended by the 55th Legislature by means of House Bill 575, effective April 17, 1997, which amendment deleted the exception regarding nonprofits (§13-35-227(4)) and expanded the class of entities affected by I-125 from corporations to include partnerships, associations, cooperatives, and other organizations. *See* Mont. Code Ann. § 13-35-236 (1997). On February 18, 1998, this court granted the *Montana Chamber* Plaintiff's summary judgment motion as to Count VI of their Amended Complaint, and in so doing declared that H.B. 575 was an unconstitutional and unenforceable abridgement of Plaintiffs' First Amendment freedoms of speech and association. This partial summary judgment decision left open the question whether I-125 itself violates the First Amendment and is therefore unconstitutional and unenforceable. This issue was set for trial to allow Plaintiffs to present their case and particularly to permit Defendants to present evidence to support their contentions that a compelling state interest justifies the speech restrictions imposed by I-125.

Evidence at Trial

Plaintiffs presented documentary evidence and witnesses, including Robert Brown, Robert Gannon, David Owen, Eric Feaver, Jerome Anderson, James Lopach, Herbert Alexander, Ed Argenbright, and Robert Moore.

Sen. Bob Brown, director of the campaign committee supporting Referendum 113, the Six Mills Levy University Funding Initiative, testified extensively regarding the manner in which I-125 hampered his ability to raise funds for R-113. Sen. Brown testified that many corporations, both for-profits and non-profits, were not contributing to this initiative campaign as they had in the past because of fear of running afoul of I-125, and that as a result the campaign committee lacked funds with which to educate Montanans about R-113.

Robert Gannon, Chairman of the Board, CEO, and President of Montana Power Company ("MPC"), testified persuasively regarding the inability of MPC to utilize its employee political action committee (the "MPC PAC") to respond to ballot initiatives that might threaten MPC's economic interests. Although no such ballot initiatives were qualified for the 1998 election cycle, three petitions were circulated that would have had major effects upon MPC's electric restructuring process. Mr. Gannon explained that little time is available to respond to a ballot initiative question, that he is the ultimate decision-maker regarding MPC's ballot initiative strategy, and that large amounts of money could be required to mount effective campaigns against ballot initiatives threatening MPC's interests. The MPC PAC is not an effective vehicle for this purpose, for the MPC PAC collects only about

$15,000 in funds each year (which funds are distributed to legislative candidates). The MPC PAC is controlled by a diverse committee of employees, and it therefore cannot make campaign strategy decisions as quickly as can a single individual such as the CEO of MPC. The MPC PAC therefore expresses the political positions of the employees who contribute to it; the MPC PAC does not, is not designed to, and really cannot express the political positions of MPC itself. (About half of MPC's shareholders are corporations who likewise are prohibited under I-125 according to Mr. Gannon.)

Mr. Gannon also testified that because of I-125 he was uncomfortable expressing his personal opinions in any public forum regarding a ballot issue such as R-113. Such public expressions of private sentiments might be misconstrued as a forbidden corporate in-kind contribution to the R-113 ballot issue campaign because, as President of MPC, Mr. Gannon is widely viewed as MPC's spokesperson, and he is compensated by MPC to express its views. Thus, Mr. Gannon's personal speech has been chilled in the context of ballot issue debates due to I-125.

David Owen, President of the Montana Chamber of Commerce, testified that his ability to perform his political duties as Chamber president has been all but extinguished. Most of the Montana Chamber of Commerce members are corporations; therefore a Chamber PAC would not be an effective vehicle to raise and manage ballot issue contributions and expenditures because the corporate Chamber members would be prevented from contributing to the PAC by I-125. Mr. Owen testified that he cannot travel around the state and speak to the membership of service clubs regarding ballot issues because

these audiences contain non-Chamber of Commerce members, making such travel and speaking arrangements a prohibited in-kind contribution to a ballot issue campaign. Neither can Mr. Owen be interviewed or participate in radio or television debates on ballot issues. Neither can Mr. Owen write editorials to express the political views of the Montana Chamber of Commerce regarding ballot issues, much less organize campaigns and coalitions to promote or fight ballot issues. The Montana Chamber is even reluctant to take official positions in its own newsletter for fear of communicating with non-members in violation of I-125. Like Mr. Gannon, Mr. Owen testified that his personal political speech about ballot issues has been chilled due to his concern that his speech might be attributed to the Chamber of Commerce, for which he is obviously a spokesperson.

Eric Feaver, the President of the Montana Education Association ("MEA") testified that the MEA relinquished its incorporated status in order to fight Constitutional Initiative 75 ("CI-75"), a ballot issue calling for a requirement that all taxes be put to a popular vote. Although the primary function of the MEA is to organize collective bargaining for its 10,000 members, the MEA also markets insurance and health care to its members, as well as conducting other miscellaneous business enterprises. In addition to its primary advocacy, the MEA engages in legislative lobbying and ballot issues campaigning. Although the MEA has created a PAC fund for ballot issues, and through that fund the MEA has raised over $30,000 for ballot issue campaigns, Mr. Feaver testified that the MEA was unable to raise through its PAC the amount of money it requires to fight CI-75. Because I-125

would have stifled MEA's right to political speech its corporate entity was dissolved to escape the prohibition.

Jerome Anderson, opposition campaign director for I-115 in 1990 and I-122 in 1996, testified that he does not believe that sheer dollars are the ultimate factor in an opposition campaign. Instead, Mr. Anderson believes that the defeat of other initiatives (I-115 and I-122) depended upon the development of credible, persuasive messages which were consistent with the values of a majority of voters. Mr. Anderson testified that I-125 has curtailed the free flow of information in ballot issue campaigns. As an example, he asserted that technical reports obtained from corporations for use as campaign literature in the I-122 opposition campaign could not be used after the passage of I-125 because they would be prohibited in-kind contributions to a ballot issue campaign. Mr. Anderson also noted that this was the quietest general election campaign season he can recall observing.

The testimony of Dr. James Lopach, professor of political science at the University of Montana, was particularly enlightening. Dr. Lopach has extensively studied Montana politics, electoral politics, voting behavior, and ballot elections. Dr. Lopach's expert opinion is that there is no corruption in the Montana political system. Not only is Dr. Lopach unaware of any actual corruption in Montana politics, but also he is unaware of any issue giving rise to the appearance of corruption in the eyes of the voters.

Dr. Lopach testified that Montana's political process is very healthy in that there is a proper degree of party competition, high voter turnouts, and low voter fall-off

on the ballot. Montana's voter turnout is approximately 15% higher than the national average. Voter falloff, which is defined as the failure of voters to vote from the top to the bottom of the ballot, is quite low, and in some instances voters have had a higher participation in ballot issues (at the bottom of the ballot) than in major candidate races, as in 1996 when 97.3% of the voters participated in the I-122 ballot but 97.1% of the voters participated in the governor's race.

Dr. Lopach testified that money is not the principal determinant of ballot issue campaigns. Dr. Lopach's opinion is that I-125 has had the negative effect of cutting off meaningful political speech. Although money is one factor influencing ballot issue campaigns, and media advertising is another, Dr. Lopach believes that political predisposition is primarily responsible for voting behavior. Thus, there is no credible evidence that corporate money is dominating citizen voices to the detriment of Montana's ballot initiative political process.

Dr. Lopach's testimony was echoed by Dr. Herbert Alexander, former director of the Citizens Research Foundation and professor emeritus of political science at the University of California, Berkeley. Dr. Alexander testified that neither money nor media advertising is the principal determinant of outcome in ballot issue elections. Dr. Alexander believes that Initiative 125 makes bad public policy because it removes a significant voice (i.e., that of corporations) which should be heard during ballot issue campaigns.

Secretary of State Mike Cooney, the State of Montana's Chief Election Officer, testified that there is no evidence of corruption in Montana politics in the form of buying or selling votes or tampering with election results. There is no evidence that corporate contributions or expenditures made in connection with ballot issues have reduced voter turnout or caused voter falloff on the ballot. Instead, the ballot issues in which the most money has been expended generally have had the highest voter participation.

Defendants likewise presented documentary evidence and witnesses, including Ed Argenbright, Joseph Kerwin, Dulcy Hubbert, Robert Shepard, Dennis Alexander, C.B. Pearson, Tony Jewett, Stan Frasier, John Deardourff, Mike Cooney, Samantha Sanchez, and William Chaloupka.

Dr. Robert Shepard, a Helena Physician who was one of the proponents of Initiative 115, testified regarding the difficulties the I-115 citizens' group faced in communicating their message regarding the I-115 tobacco tax. There is no doubt that Dr. Shepard was thoroughly disenchanted by the experience of campaigning against the campaign machine funded by out-of-state tobacco companies. Regrettably, Dr. Shepard testified that he will not work for another ballot issue campaign as a result of his experience with I-115. On cross-examination, Plaintiffs questioned Dr. Shepard whether proponents' failure to convince the voters to support I-115 might have been due in part to proponents' mistakes, questioning whether proponents' strategy might have been poorly planned,

whether proponents' political experience was insubstantial, and whether proponents' fund-raising techniques might have been inadequate.

The court also received testimony from Tony Jewett, executive director of the Montana Wildlife Federation, who testified regarding his experience in 1980 as a proponent of Initiative 87, a recycling initiative, and his involvement in Initiative 122, a clean water initiative. Mr. Jewett testified to feeling discouraged by his experiences with I-87 and I-122 because citizen proponents could not raise comparable funds to purchase media advertising as could their corporate opponents. Likewise, Mr. Stan Frasier testified to his experience as the Helena area captain of Initiative 122. From that experience, Mr. Frazier feels that citizens cannot win against corporate money in ballot issue campaigns.

John Deardourff testified regarding a survey taken by his polling firm which indicates that Montana citizens are displeased generally because of their perception of excessive corporate spending during ballot issue campaigns.

On direct examination by Defendant-Intervenor, Secretary of State Mike Cooney testified that he believes that corporate dollars are corrupting Montana's ballot initiatives and causing people to walk away from that political process. Secretary Cooney testified that I-125 brings reasonable limits to excessive spending, levels the playing field for citizens and corporations, and promotes an equal amount of communication from both sides. However, when questioned by Plaintiffs' counsel, Secretary Cooney

acknowledged that voter statistics do not show that Montanans are turning away from the ballot initiative process or elections in general.

Ms. Samantha Sanchez is the executive director of the National Institute on Money in State Politics. Ms. Sanchez claims to be an expert in the area of campaign contributions, and she studies the comparative ratio of campaign contributions by analyzing contributions patterns, source, and quantity. Ms. Sanchez testified regarding contributions from out-of-state corporations in certain ballot issue elections compared to overall contributions and expenditures and compared to contributions and expenditures in other statewide and local elections.

Dr. William Chaloupka opined that (expensive) repetitive media advertising works and that political campaigns rely upon rhetoric and imagery, communicated by various media, to persuade voters to adopt a particular point of view. Dr. Chaloupka, a professor of political science at the University of Montana, has not specialized in the area of Montana ballot initiatives.

The court also received testimony from witness C.B. Pearson, a former executive director of Common Cause of Montana, and the campaign manager for Initiatives 114, 118, and 125. Mr. Pearson is quite familiar with Montana's ballot initiative process, having personally participated in that process and having authored a monograph on the subject, "Big Money in Montana Ballot Campaigns (1982-1994)."

Mr. Pearson testified that he believes that the domination of corporate dollars is an abuse of the ballot initiative process and that corporate money discourages

citizens from proposing ballot issues. Specifically, Mr. Pearson testified that his analysis of Montana ballot issue elections shows that in nine initiatives wherein proponents were outspent by a 2/3 margin, seven of the nine initiatives (77%) were defeated. On cross-examination, Plaintiffs showed that when all ballot initiatives are considered wherein one side outspend the other side by a 2/3 margin, the side outspending won ten times and lost nine times.

Discussion

Having considered all the evidence submitted by the parties, the court finds Plaintiffs' evidence to be credible and persuasive. The court accepts the expert testimony provided by Dr. Lopach, who asserted there is no corruption or appearance of corruption in Montana ballot issue elections and that this Montana political process is healthy and of sound integrity. The court accepts the testimony of both Drs. Lopach and Alexander that many factors influence election outcome, particularly the political values, predispositions, and party loyalty of the voters, and that neither money nor media advertising is the sole or even the single most important variable controlling election outcomes. The court accepts the testimony of Plaintiffs' witnesses that Initiative 125 deprives corporations of the ability to communicate their political views during ballot issue campaigns.

The court finds the defense witnesses who testified regarding their participation in ballot issue campaigns to be sincerely motivated and public-spirited persons. Some

of these witnesses appear to have had unfortunate experiences by being involved in issue campaigns in which their sides lost and the other side had a disproportionate amount of funds. Apparently these witnesses have made the leap in logic that they lost solely because of the opposing side's funds, which the court considers to be an unwarranted but all too human conclusion. The collective sincerity of these witnesses inclines the court to a sympathetic view of their testimony, but they simply have not proven their contention by a preponderance of the evidence.

Of course money can and does have a potential effect on the outcome of elections. It is one of many factors. Multiple variables other than money and media influence election outcomes. Montana ballot issue elections are not corrupted by the political expressions of corporations. The ballot issue process in Montana is healthy and not corrupt. Montana has no compelling state interest which would justify the abridgement of First Amendment rights imposed by Initiative 125.

The court concludes first and foremost, that Initiative 125, perhaps facially and certainly as applied, infringes upon the First Amendment rights of speech and association of the Plaintiffs and others subject to the prohibitions contained therein. Initiative 125 is not narrowly tailored to address only the campaign contributions and expenditures of large corporations. The reported aim of its drafters was to catch the big fish – shut off the large campaign warchests. But the net cast by Initiative 125 arguably also catches tens of thousands of little fish, individual Montanans who have banded together to enhance their political speech through organizations such

as the Montana Education Association, the Montana Stockgrowers Association, the Montana Wool Growers Association, the Montana Chamber of Commerce, the Montana Farm Bureau, the Montana Hospital Association, the Montana Medical Association, the Montana Taxpayers' Association, and others.

"A major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The First Amendment therefore protects political expression, and in so doing "serves significant societal interests" and "often protects interests broader than those of the party seeking their vindication. . . . " *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978). Thus, the proper question is whether a particular type of expression deserves First Amendment protection. *Id.*

Requiring corporations to fund ballot issue campaign speech through separate, segregated funds (consisting of voluntary contributions from employees, officers, directors, and shareholders), as is required by Initiative 125, deprives corporations of their ability to communicate political ideas directly to the electorate. The corporate voice is silenced. Initiative 125 chills impermissibly the speech and association rights of corporations and their officers and employees. Initiative 125 precludes corporations from directly resisting potential laws that could put them out of business. Requiring shareholders to fight the corporation's battles is an ineffective and illegal substitution for corporate speech rights. Perhaps almost as important, Initiative 125 prevents the electorate from being exposed to diverse viewpoints on public policy issues.

The State of Montana, which is represented by Defendant and Defendant-Intervenor, must show a compelling state interest to justify a significant infringement of core First Amendment rights. *Colorado Repub. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996). Leveling the playing field by equalizing the strength of citizen speech relative to corporate speech is inconsistent with First Amendment purposes and principles. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). To accomplish the necessary showing, the State must demonstrate the existence or appearance of corruption, which the court defines to include real harm to the integrity of Montana's ballot initiative process. Real harm does not include "wasteful and excessive campaign spending." *Colorado Republican Federal Campaign Committee*, 518 U.S. at 617. While it may be conceivable that corporations could overwhelm the political speech of individual citizens in a particular case to such a degree that the integrity of the ballot initiative process itself is damaged, *see Austin v. Michigan Chamber of Commerce*, 494 U.S 652, 661 (1990), the meager anecdotal evidence presented by the Defendants wholly fails to prove that such has occurred in Montana. The State has failed to show that corporate contributions or expenditures in ballot initiate campaigns have had any adverse effect on the integrity of Montana's political process. Specifically, the State has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process.

Corporations are therefore entitled to defend their economic interests by resorting to the corporate treasury to fund their participation in ballot initiative campaigns.

Like individuals, unions, and associations, corporations are entitled to attempt to shift public opinion and voting behavior to favor the corporate point of view, and in fact this is the primary purpose of all political speech, *see Bellotti*, 435 U.S. at 790. It is up to the voters to determine whether they approve or disapprove of a corporation's point of view. The purpose of the First Amendment is to allow "each person [to] decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broadcasting System, Inc. v. Federal Communication Commission*, 512 U.S. 622, 641 (1994).

The popular sentiment among Montana voters may be that there is too much corporate money influencing ballot issue campaigns and also that it is exceedingly difficult for ordinary citizens to participate successfully in some ballot issue campaigns. However, the law of the United States is that political speech is protected by the First Amendment, and this rule of law benefits all Montanans. The court is sensitive to the complaint that I-125 represents the will of the people. As a matter of law, however, it is simply not relevant that Initiative 125 was enacted by the voters rather than the legislature, "because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981).

In order to promote open and informed discussion of public affairs, the First Amendment seeks to "protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Under the law of the United States, that protection is

granted to political speech without regard to its source, whether individual, corporation, union, or other association. Freedom of speech regarding public affairs is one of the cornerstones of self-government. "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

Accordingly,

IT IS HEREBY DECLARED that Initiative 125 is unconstitutional and therefore null and void, with no legal force or effect. The State of Montana is directed to cease its enforcement of the provisions of Initiative 125. Judgment shall be entered in Plaintiffs' favor in both *Montana Chamber* and *Montana Mining Ass'n*, although in the latter case the court denies the Plaintiffs' preliminary injunction motion as to Initiative 137 because the relief sought was premature as of the close of evidence.

Each party shall bear its own fees and costs.

IT IS FURTHER ORDERED that the complaint in *Montana Chamber* is DISMISSED as to Montana Education Association for its lack of standing to sue.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 20th day of November, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

MONTANA MINING ASSOCIATION, et al

JUDGMENT IN A CIVIL CASE

V.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, et al

(Filed Nov. 20, 1998)
CASE NUMBER: CV 97-6-H-CCL

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Initiative 125 is unconstitutional and therefore null and void, with no legal force or effect. The State of Montana is directed to cease its enforcement of the provisions of Initiative 125. Judgment is entered in Plaintiffs' favor. Each party shall bear its own fees and costs.

November 20, 1998
Date

Lou Aleksich, Jr.
Clerk

/s/ Gayle Reuterdahl
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

MONTANA CHAMBER OF COMMERCE, et al

V.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
CV 98-37-H-CCL
(Filed Nov. 20, 1998)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Initiative 125 is unconstitutional and therefore null and void, with no legal force or effect. The State of Montana is directed to cease its enforcement of the provisions of Initiative 125. Judgment in [sic] entered in Plaintiffs' favor. Each party shall bear its own fees and costs.

November 20, 1998
Date

Lou Aleksich, Jr.
Clerk

/s/ Gayle Reuterdahl
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

CV 97-6-H-CCL

OPINION AND ORDER
(Filed Feb. 18, 1993)

Before the court is Plaintiffs' motion for summary judgment. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2201. The court, having carefully reviewed the briefs and supporting documents, and having heard the parties' arguments at hearing, is prepared to rule.

BACKGROUND

In 1906, Montanans voted by a six-to-one margin to establish an initiative and referendum ("I&R") process by which citizens might propose new laws and petition to have such proposals considered by all Montanans in a ballot election. Sometimes called "direct democracy," the I&R process encourages citizens to participate in the political process and supposedly allows ideas generated at a grassroots level to be put to popular vote instead of being filtered through the legislative process. Approximately 24 states have similarly enacted an I&R process. Pl.'s Mem. Supp. Summ. J., Alexander Aff. at 5.

In 1912, Montanans passed the Corrupt Practices Act (through the initiative process), the general purpose of which was to limit corporate spending in Montana politics. Among the limitations enacted was the prohibition of corporate spending in the I&R process, and for some sixty years corporate spending was prohibited in the I&R process in Montana. However, in 1972, in *State ex rel. Nybo v. District Court of the First Judicial District*, 492 P.2d 1395, 1399 (1972), the Montana Supreme Court interpreted the relevant Montana statute, § 23-4744, R.C.M. (1947), not to contain an I&R corporate spending prohibition. That Court reasoned that a statute prohibiting corporate payments or contributions intended to promote or defeat any political party or organization could not apply to initiatives and referenda, which are a part of the legislative process.

In response, the Montana legislature amended § 23-4744 in 1975, this time making explicit its prohibition of corporate spending in the I&R process. The penalty for

corporate spending in ballot elections was substantial: such a corporation could be fined up to $10,000 and lose its corporate charter if organized under the laws of the State of Montana, or, if a foreign corporation, be enjoined from transacting business in the state. § 23-4768 R.C.M. (1947).

This 1975 law was tested in *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd* 583 F.2d 421 (9th Cir. 1978), which held that a total prohibition against *all* corporate contributions or payments to ballot elections was an overbroad, blanket infringement of corporations' First Amendment rights. Thereafter, until 1996, it was clear that corporations were permitted to spend money to promote or oppose Montana ballot issues.

In the November 1996 general election, however, Montana voters approved Initiative 125, which provided as follows:

> (1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a . . . ballot issue, or a political committee which supports or opposes a . . . ballot issue.
>
> (b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.
>
> . . .
>
> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas, and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

Corporations making contributions or expenditures in violation of 1-125 are subject to civil penalties in an amount up to $500 or three times the amount of the unlawful contribution or expenditure, whichever is greater. Mont. Code Ann. § 13-37-128.

I-125 was amended by House Bill 575, effective upon passage when signed by Governor Marc Racicot on April 17, 1997. H.B. 575 expands the class of entities affected by I-125 from corporations to include all non-profits, partnerships, associations, cooperatives, and other organizations. *See* Mont. Code Ann. § 13-35-236 (1997). The same civil penalties apply to this expanded class of affected entities. *See* Mont. Code Ann. § 13-37-128 (1997).

Plaintiffs filed their First Amended Complaint on May 16, 1997, seeking a judicial determination that I-125 violates Plaintiffs' constitutional right to engage in political speech and association (Count I), including their right to make contributions and expenditures in support of or in opposition to ballot issues. Count II asserts that I-125 is void for vagueness, both facially and as applied, because it fails to define "business activities" that nonprofit corporations must not engage in if the prohibition of I-125 is

not to be applied to those nonprofits. Count III asserts that I-125 is void for vagueness, both facially and as applied, because it fails to define "corporations," "for-profit corporations" or "nonprofit corporations," and thus it has a chilling effect upon business organization which may or may not be subject to the prohibitions of I-125. Count IV claims that I-125 is overly broad, constituting an unconstitutional deprivation of Plaintiffs' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Count V alleges that I-125 violates Plaintiffs' right to Equal Protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution in that I-125 does not apply to unincorporated entities such as labor organizations, and there is no compelling state interest to make such a distinction. Count VI alleges that H.B. 575 violates Plaintiffs' rights of free speech and association protected by the First Amendment to the United States Constitution.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Ninth Circuit, guided by the United States Supreme Court, has set the following standard for consideration of summary judgment motions: "If the party moving for summary judgment meets its initial burden of identifying for the

court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in rule 56, 'specific facts showing that there is a genuine issue for trial.' " *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (*quoting* Fed.R.Civ.P. 56(e) and *citing Celotex v. Catrett*, 106 S. Ct. 2548, 2553 (1986)). In considering specific facts offered by the non-moving party, the district court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31 (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986)).

A "material" fact for Rule 56 purposes is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S., 242, 248-49 (1986).

Rule 56(c) requires a court to enter summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). A mere scintilla of evidence in support of the non-movant's position is insufficient: "[T]here must

be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252.

APPLICABLE LAW GOVERNING CAMPAIGN FINANCE

In analyzing the conflicting claims of the parties, the court begins by examining the substantive law governing Plaintiff's claims. In their facial challenge to § 13-35-236, Plaintiffs face a "heavy burden" to show that the statute challenged can never be applied constitutionally. *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S. Ct. 1759, 1767, 114 L.Ed.2d 233 (1991) ("The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.").

In balancing the competing interests involved in *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976) (holding that complete prohibition on corporate spending for ballot elections was impermissible infringement of corporations' First Amendment rights), *aff'd* 583 F.2d 421 (9th Cir. 1978), the district court found that the governmental interest in the integrity of the political process was outweighed by a corporation's right to communicate information and ideas and the electorate's right to receive corporations' information and ideas. *C & C Plywood Corp.*, 420 F. Supp. at 1264. The district court relied upon *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (holding ceilings on candidate contributions permissible but independent expenditure ceilings impermissible), for its recognition that, in the election context, media communication is the most effective political speech and also

the costliest, but that without such communication the electorate cannot be well-informed. *Buckley*, 424 U.S. at 19. Thus the First Amendment protects the "uninhibited, robust, and wide-open" debate that is required to allow private citizens to make informed choices among candidates. *Id.* Following *Buckley*, the Montana federal district court also rejected the idea of governmental management of the referendum process in an attempt to equalize financial disparities between various groups. *C & C Plywood Corp.*, 420 F. Supp. at 1265 (*citing Buckley v. Valeo*, 424 U.S. at 49).

In affirming the district court decision in *C & C Plywood*, the Ninth Circuit panel relied upon a newer United States Supreme Court decision, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L.Ed.2d 707, 98 S. Ct. 1407 (1978), which, unlike *Buckley*, specifically addressed ballot measures. *See C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 423 (9th Cir. 1978). *Bellotti* confirmed that corporations as weli as individuals have First Amendment rights, and that complete prohibitions of corporate spending on ballot issues is a blanket infringement of First Amendment rights. *Bellotti*, 435 U.S. at 784-86.

In *Bellotti*, the Court examined a Massachusetts statute prohibiting corporations from directly or indirectly contributing any money to influence the vote on any question submitted to the electorate unless the property, business, or assets of the corporation were materially affected by the vote. *Bellotti*, 435 U.S. at 767.[1] The

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[1] The statute further specified that "[n]o question submitted to the voters solely concerning the taxation of the

Massachusetts statute also prohibited any officer or agent acting on behalf of the corporation to contribute money to ballot issues. *Id.* at n.2. The plaintiffs, two banking associations and several business corporations, wished to spend money to advertise their disapproval of a referendum authorizing the Massachusetts legislature to enact a graduated personal income tax. *Id.* at 748. The Supreme Court held that the statute violated plaintiffs' First Amendment right of free speech as made applicable to the States by the Fourteenth Amendment, finding that this abridgment was not justified by a compelling state interest. *Id.* at 776.

In examining the governmental interests at stake, the Court discussed Massachusetts' interest in sustaining citizen participation in ballot elections, noting that it is through their election activities that citizens develop a confidence in government. *Id.* However, the Court found that Massachusetts had failed to show that corporate voices had overwhelmed or even significantly influenced state referenda and that the state had also failed to show that there was any threat to citizens' confidence in the government. *Id.* at 789-90. In addition, the Court found that the state's prohibition on corporate speech was not narrowly tailored to the state's interest in protecting

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income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation," thus completely prohibiting corporations from spending money on tax-related ballot questions. *Bellotti*, 435 U.S. at 768. The penalties for violating this statute were fines of up to $50,000 for a corporation, $10,000 for a corporate officer, director, or agent, or imprisonment up to one year, or both a fine and imprisonment. *Id.*

shareholders who hold views divergent from the corporate viewpoint. *Id.* at 728. And finally, the risk of corruption perceived by the Court in partisan candidate elections was not present in the case. *Id.* at 787-88.

In the *Bellotti* dissent, Justice White (joined by Justices Brennan and Marshall) argued that the state's regulatory interest is itself derived from the First Amendment, meaning that the right of citizens not to be overwhelmed by corporate speech is a competing First Amendment interest. *Id.* at 803-04.[2] The dissent also notes that at that time some 18 states prohibited or limited corporate contributions to ballot elections. *Id.* at 803 n.1. The *Bellotti* dissent also distinguishes corporate speech, which is the expression of an artificial entity, from the principal types of speech protected by the First Amendment: "the use of communications as a means of *self*-expression, *self*-realization, and *self*-fulfillment, is not at all furthered by corporate speech." *Id.* at 804-05 (emphasis added). The dissent argued that

> [e]ven complete curtailment of corporate communications concerning political or ideological

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[2] This viewpoint is echoed today in opinions disfavoring the *Buckle* equation of money with speech and question whether corporate money actually helps to create a political marketplace of ideas. For example, in his dissent to *Clifton v. FEC*, 114, F.3d 1309, 1319 n.6 (1997) (dissent), Senior Judge Bownes argues that

> [in] reality, however, *Buckley's* equation of money and speech does not serve the goal of ensuring that the best ideas emerge from a true (and fair) competition among differing viewpoints. Rather than rewarding people or candidates who put forward good ideas, this system rewards people who happen to control vast amounts of money.

> questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. Moreover, it is unlikely that any significant communication would be lost by such a prohibition. These individuals would remain perfectly free to communicate any ideas which could be conveyed by means of the corporate form. Indeed such individuals could even form associations for the very purpose of promoting political or ideological causes."

Id. at 807.

Noting that corporations are artificial entities created by law to achieve economic goals, not to use its "wealth to acquire an unfair advantage in the political process," the dissent concludes that "[t]he State need not permit its own creation to consume it." *Id.* at 809. Finally, the dissent pointed out that the federal Corrupt Practices Act, enacted in 1907 and barring corporate contributions to federal elections, had already been recognized by the Court to have been motivated by the desire "to avoid the deleterious influence on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *Id.* at 812 (*quoting United States v. Automobile Workers*, 352 U.S. 567, 585 (1957)).

Justice Rehnquist, in his separate dissent to *Bellotti*, argued that states are not required by the Fourteenth Amendment "to endow a business corporation with the power of political speech" because in his view business corporations only possess the rights and properties expressly or incidentally conferred by their charters of

creation. *Id.* (Rehnquist dissent) at 749 n.6. Justice Rehnquist rejected the view that the free-flow of information was in any way diminished by the State of Massachusetts' limitation of corporate speech (as opposed to the speech of natural persons) in ballot elections. *Id.* at 828.

Despite these dissenting opinions, with *Bellotti*, the law of corporate expenditures for ballot elections was clearly established and has remained so to this day. In fact, this is a small and somewhat unique niche in elections law generally, because ballot issue elections are not permitted by federal elections law and fewer than half of all states allow ballot issue elections. Montana law has clearly permitted corporate expenditures in the context of ballot issue elections since *Nybo* and *C & C Plywood*.

Nevertheless, there have been interesting parallel developments in federal elections law with the growth of independent expenditures during candidate election campaigns. Independent expenditures, unlike contributions to candidates, are expenditures that are not solicited by, directed by, or coordinated with a candidate or political party. *Buckley v. Valeo*, 424 U.S. 1, 36-37, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). Two recent cases in the area of independent expenditures, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986) ("MCFL"), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 664-65, 110 S. Ct. 1391, 1400, 108 L.Ed.2d 652 (1990), exemplify the partial transition of modern-day campaign finance from the traditional financial support for candidates to the newer methods of independent expenditure. *See also Colorado Republican Fed.*

Campaign Comm. v. FEC, ___ U.S. ___, ___, 116 S. Ct. 2309, 2319, 135 L.Ed.2d 795 (1996).

In *MCFL*, the court examined a federal statutory ban on corporate contributions prohibiting independent expenditures used to expressly advocate the election or defeat of a candidate. *MCFL*, 479 U.S. at 248, 93 L.Ed.2d at 550. The Court held unconstitutional, as applied to MCFL, a statute precluding a nonprofit corporation from making independent expenditures expressly advocating election or defeat of a candidate, without first having channeled its money through a segregated fund. *MCFL*, 479 U.S. at 263, 93 L.Ed.2d at 560.

However, the Court expressly rested its holding on the premise that MCFL possessed certain characteristics satisfying a three-part test: (1) the non-profit's express founding purpose is to promote political ideas and not to conduct business, (2) no shareholders or other persons have a claim on the non-profit's assets or earnings, and (3) the non-profit was not established by a business corporation or labor union and its policy is not to accept contributions from such entities. *MCFL*, 479 U.S. at 263-64, 93 L.Ed.2d at 560.

The Court's holding (that a nonprofit corporation such as MCFL could make independent expenditures out of its general treasury) is tempered, however, by the Court's prompt acknowledgment of "the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." *Id.* at 263. The Court also distinguished the facts in *MCFL* from *Bellotti*'s absolute prohibition on corporate spending from the

Massachusetts law restricting corporate spending to the use of segregated funds. *Id.* at 259 n.12.

Recognizing the problem of large influxes of corporate money into the political marketplace, the Court stated that

> [r]elative availability of funds is after all a rough barometer of public support. The, resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258, 93 L.Ed.2d at 556. Accordingly, actual corruption, as in quid pro quo corruption (payments to candidates for future favors), has never been the sole concern of the court. In *Buckley v. Valeo*, wherein the court discussed the impact of large individual contributions to candidates, the Court noted that the government has a compelling interest extending beyond quid pro quo corruption: "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the

appearance of corruption[3] stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27, 96 S. Ct. at 638-39. The appearance of corruption is significant because it directly impacts citizen confidence in our political and electoral systems.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 108 L.Ed.2d 652, 110 S. Ct. 1391 (1990), the Court recognized that our political system can be undermined not only by the appearance of (quid pro quo) corruption but also by yet another type of corruption resulting from "vast reservoirs of capital" that "distort[ ] the political process" and do not reflect voters' evaluation of the merits of political ideas. *Austin*, 494 U.S. at 661, 110 S. Ct. at 1398. The Court noted with particularity the special privileges granted to corporations by state law that allow corporations to amass wealth: limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets. *Austin*, 494 U.S. at 658-59, 110 S. Ct. at 1396-97.

Austin involved a Michigan statute prohibiting corporations from using general treasury funds for independent expenditures favoring or opposing candidates for political office. The state statute did permit such independent expenditures to be made from PAC funds.

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[3] In *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97, 84 L.Ed.2d 455, 105 S. Ct. 1459 (1985) (NCPAC), the Court stated that "preventing corruption *or the appearance of corruption* are the only legitimate and compelling government interests thus far identified for restricting campaign finances" (emphasis added).

The Michigan Chamber of Commerce, however, a non-profit corporation having many members that are for-profit corporations and requiring dues of all members, and having both political and non-political purposes and activities, was deemed by the Court not to fall within the *MCFL* exception for politically-oriented non-profits. Therefore, the Court held that the Michigan Chamber could be required to make independent expenditures through a PAC fund rather than directly from the Chamber's general treasury. *Austin*, 494 U.S. at 660.

Within the Court's strict scrutiny analysis of this burdening of the Michigan Chamber of Commerce's First Amendment rights, the compelling state interest found by the Court was Michigan's interest in regulating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. The state thus has the right to "ensure[ ] that expenditures reflect actual public support for the political ideas espoused by corporations." *Id.* Even though *Austin* did not involve candidate contributions but independent expenditures, the Court left no doubt that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.*

DISCUSSION

Defendant and Intervenor argue that this court should apply the *Austin* standard to the instant case in

determining whether the Montana statute regulating corporate expenditures for ballot issue elections violates the First Amendment. Defendant and Intervenor analogize the independent expenditures involved in a ballot election to the independent expenditures involved in a candidate election. They argue that the U.S. Supreme Court, having defined a new compelling state interest to accommodate independent expenditures cases, has departed from the requirement that governments show a danger of quid pro quo corruption to justify restricting and regulating independent expenditures. Defendant and Intervenor ask this court to apply the new standard as outlined in *Austin* whereby a government may show a compelling interest justified by the danger of corruption of elections due to the corrosive and distorting effect of immense aggregations of wealth accumulated through the corporate form.

Plaintiffs, on the other hand, argue that *Bellotti* controls this case, meaning that there is a bright-line distinction between ballot issue cases and candidate campaign cases (whether candidate contribution cases or independent expenditure cases). Plaintiffs urge the court to disregard *MCFL* and *Austin* because those cases, albeit independent expenditure cases, arise in the context of candidate campaigns – and thus can be categorized as addressing the traditional underlying danger of quid pro quo corruption.

However, simply by examining *Bellotti* this court is able to discern two fundamental differences in that case from the instant case. First, *Bellotti* involved an absolute prohibition on corporate speech in ballot elections not

involving property, assets, or operations of the corporation. The instant case, however, examines a Montana statute that merely restricts corporate speech to the use of money from segregated funds.[4] Second, the *Bellotti* court did not create a bright-line division between ballot questions and candidate elections, stating instead that "[i]f appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. [citation omitted] But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government." *Bellotti*, 435 U.S. 789-90, 55 L.Ed.2d 707, 726. Thus, *Bellotti* left open the door for the factual development urged by Defendant and Intervenor today.

"Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *Bellotti*, 435 U.S. at 725 (*quoting Buckley v. Valeo*, 424 U.S. at 25); *see also United States v. Automobile Workers*, 352 U.S. 567, 570, 1 L.Ed.2d 563, 77 S. Ct. 529 (1957).

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[4] The court notes Defendant Argenbright's contention that Montana's reporting requirements applicable to segregated funds are not nearly as burdensome as the federal requirements. *See* Mont. Code Ann. § 13-37-201 *et seq.*

The segregated funding regulation imposed upon business corporations by I-125 is not an absolute ban on corporate speech as was the case in *Bellotti* or in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Similarly, federal and state PAC fund regulations that limit independent expenditures and direct contributions to candidates do not impose an absolute ban on corporate speech. *See Austin*, 494 U.S. at 660-61. Nor is I-125 an attempt to equalize financial resources among political groups (for there is no ceiling on the amount a corporation can spend on ballot issues through its segregated fund), but to regulate the political use of economic resources accumulated by privileges granted by the state in order to prevent corruption and distortions of the political marketplace of ideas. Finally, the segregated fund regulation imposed by I-125 is narrowly tailored to satisfy Montana's compelling interest in protecting the integrity of its political system while yet permitting corporate speech by the officers, directors, shareholders, and other employees or members of corporations. This is so because the regulation is "precisely tailored" to the state's intent to "eliminat[e] from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." *Austin*, 494 U.S. at 666, 108 L.Ed.2d at 669.

The court rejects Plaintiffs' argument that I-125 violates the Equal Protection Clause in that it focuses its regulatory burden upon business corporations and provides an exception for certain non-profit corporations while ignoring partnerships, associations, and other unincorporated entities. Similarly I-125 is not underinclusive

because it does not apply the same restrictions to unincorporated entities that it applies to corporations. These arguments have been disposed of in *Austin*. *See Austin*, 494 U.S. at 665-66, 108 L.Ed.2d at 668. The court also rejects Intervenor's argument that the court may not rule on certain issues, such as the constitutionality of H.B. 575 as applied to partnerships and other entities not represented by Plaintiffs because when it is clear that the law would be unconstitutional under the overbreadth doctrine, the court need not have before it that particular party-plaintiff to so rule. *New York v. Ferber*, 458 U.S. 747, 768-70, 102 S. Ct. 3348, 73 L.Ed.2d 1113, 1129-31 (1982); *see also* Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1.

As to Counts Two and Three, the court rejects Plaintiffs' argument that I-125 is void for vagueness because it fails to define what business activities a nonprofit must not engage in (Count II) and because it fails to define "corporation," "for-profit corporation," or "nonprofit corporation" (Count III).

Turning, then, to the factual basis for Defendant and Intervenor's arguments as to Count I, the court examines what facts might exist to support a compelling state interest. Plaintiffs' expert, Herbert Alexander, director of the Citizens' Research Foundation at the University of Southern California and professor of political science, attests to his belief that "it takes money to illuminate the issues in a ballot campaign" and "[t]oo little money in the campaign process can be extremely harmful." Alexander Aff. at 6. Prof. Alexander also believes that "[i]t is better public policy to permit freedom to give directly in support of or opposition to ballot initiatives." Alexander Aff. at 9. In a

Supplemental Affidavit responding to Intervenor's affidavits, Prof. Alexander opines that Intervenor's affidavits are insufficient to support a theory that there is a causal relationship between money spent and election outcomes. Alexander Supp. Aff. at 3.

Intervenor asks the court to scrutinize four ballot initiatives in which large corporate contributions allegedly overwhelmed citizens voices, presumably resulting in the defeat of these citizen-sponsored ballot initiatives.

Intervenor presents the affidavit of Dr. Robert Shepard, of Helena, Montana, who in 1990 took a sabbatical from his medical practice to volunteer on behalf of I-115. This initiative proposed to levy a tax on the sale of tobacco. Dr. Shepard states that he believed that people would benefit from the reduction in tobacco use resulting from higher priced products. Dr. Shepard testifies that the citizen's group promoting the initiative raised $40,000 to support I-115, but they faced 16 corporate entities (including R.J. Reynolds, Philip Morris, and the Tobacco Institute) that funded an opposition campaign with $1,500,000.00. The largest contribution received by the citizen's group was a $9,345 cash and $3,282 in-kind contribution from the American Cancer Society, a non-profit corporation from Atlanta, Georgia. Over 50 Montana physicians contributed to the I-115 citizens group.

However, the corporate side spent 99.7% of all funds expended for the I-115 ballot issue. "The campaign was funded by money from tobacco companies including over $600,000 from Philip Morris of New York, NY; over $300,000 from R.J. Reynolds of Winston-Salem, NC; and

over $200,000 from the Tobacco Institute, a non-profit industry advocacy group from Washington, DC. In total 16 corporate entities spent or gave over $1,500,000 against I-115." Shepard Affidavit at 2.

Dr. Shepard's feelings about the ballot election process in which he directly participated are as follows:

> I recall one instance when I went (taking time as a volunteer from my practice) to Butte to debate a professional lobbyist who was paid more ($60,000) for his work against I-115 than our entire side had for our entire campaign. I recall how unfair I thought the process was. I thought it was unfair because any debate (free media) was provided equally to both sides while the corporate side bought an overwhelming amount of paid media in which it argued its side without rebuttal from our side.
>
> I believe that the initiative process is good in concept as it allows citizens to place issues, like the tobacco tax, on the ballot for direct lawmaking. It is important to have that option because the legislative route is politically closed due to the presence of an extensive lobby funded by the tobacco interests.
>
> However, the ability of corporations to directly spend money from the corporate treasury on initiatives denies fair play in the initiative process. To these large corporations $50,000 of corporate money is not significant. To ordinary Montana citizens that kind of money is not there.
>
> Based on my experience with I-115 I believe that the unlimited use of corporate funds corrupts the fairness of the process by allowing the

> corporate side to make virtually unlimited arguments using corporate money which cannot be responded to by the citizen side.

Aff. Robert Shepard, 13 Oct. 1997, at 2-3. Moreover, Dr. Shepard notes that polling performed by newspapers showed that there was strong public support for I-115 initially and throughout much of the campaign. Shepard Affidavit at 2.

The next affidavit is submitted by Tony Jewett, of Helena, Montana, who worked on behalf of I-87, the 1980 "bottle bill." In this ballot election, corporate opponents spent $575,000 as opposed to the proponents' $26,000, so that corporations spent 99.6% of all funds spent during the I-87 campaign. Again, Jewett states that polls indicated initially that, two to one, the public favored I-87, and Jewett attributes the election loss "in large part to the enormous use of big business corporate money and resources." Jewett Affidavit, 14 Oct. 97, at 2. The corporate funding including $67,000 from the Can Manufacturer's Institute; $51,000 from Owens-Illinois; $27,000 from Coca-Cola, Inc.; $26,000 from the Glass Packaging Institute; and $25,000 from Pepsico, Inc.., and 70 other business corporation or trade association contributions. Jewett Aff. at 2.

Jewett attests that "[d]uring September and October of 1980 the I-87 proponents had to endure virtually nonstop media advertising against I-87. The arguments raised against I-87 could have been rebutted and therefore I-87 support may have persevered if it had been possible for proponents to respond. However, because of the disparity in funds the proponents could not respond and the only arguments many people heard were the

ones paid for by the opponents." Jewett's perception of the initiative process has been negatively colored by his direct experience in the process: "The initiative process was, in my judgment, skewed and made unfair by such a one sided access to funds in amounts far beyond that which an ordinary Montana person could hope to donate to any initiative." Jewett Aff. at 2-3.

A bottle bill initiative (I-113) was again presented to Montana voters in 1988, and Brad Martin, of Helena, Montana, discussed in his affidavit the fact that 200 corporations contributed $500,000 against I-113, expending 90% of the total funds spent on this initiative campaign. Contributors opposing I-113 included Coca-Cola Company, Atlanta, Ga. ($35,000 cash and $11,400 staff/travel); Pepsi-Cola Company, Somers, NY ($35,000 cash and $4,100 staff/travel); Anheuser-Busch Companies, Inc., St. Louis, MO ($8,400 cash and $36,300 staff/travel); Can Manufacturers Institute Legislative Committee, Washington, DC ($44,160), Industry Union Glass Promotion Program, Washington, DC ($77,000 cash and $7,100 staff/travel). Martin notes that even beverage truck drivers carried anti I-113 materials on their routes through Montana, and six-packs of beverages in stores carried orange anti I-113 stickers on them.

As to his perception of the initiative process in which he participated, Brad Martin states that

> I believe that I-113 lost because the corporate side was able to use its corporate trucks, employees, and money to work against I-113 without restriction. I believe that in a fair debate I-113 would have passed into law. . . .

> I do not object to a corporation or its people speaking out in regard to I-113. What I do object to is the use of the corporate funds and corporate property during the campaign as it gives an unfair advantage to those who control the corporate property. In effect, the corporate wealth slams the door on citizens seeking to use the initiative process. That is just plain wrong as the initiative process was supposed to be a safety valve for citizens who believe they were shut out of legislative system dominated by lobbyists and other political insiders.

Jewett Aff. at 4-5.

During the 1996 general elections, Stan Frasier, of Helena, Montana, volunteered for a citizens group that proposed I-122, an initiative that would have restored more stringent water quality standards which had been lessened by the 1995 Montana legislature. This citizens group was well-organized and actively sought to obtain the kind of funds it would need to compete with corporate opposition. In fact, the citizens group raised over $460,000 from over 700 individuals, 50 non-profit organizations, and over 20 for-profit corporations. The citizens group proposing I-122 mounted a media campaign with print and electronic advertising, and polls showed strong public support, both initially and through summer and early fall of 1996.

Corporate opposition came in the form of $2,000,000 in cash and in-kind contributions from the mining corporations affected by water quality discharge standards: ASARCO ($350,000); Golden Sunlight Mine, Inc. ($350,000 cash and $39,000 in-kind); Pegasus Gold Corp. ($210,000 cash and $160,000 in-kind); Seven-Up Pete Joint Venture

($500,000 cash and $27,000 in-kind); and over 100 other for-profit corporate contributions. It is note-worthy that just one corporate contribution, made by the Seven-Up Pete Joint Venture, exceeded the entire campaign funding of the citizens group.

Corporate opponents ran a media campaign (radio, television, newspaper advertising) in June, July, and August, 1996. Nevertheless, public approval for I-122 held throughout the opposition campaign, until the public was subjected to a media blitz in September and October, 1996.

Stan Frasier's impressions of his citizen participation in the ballot initiative process in Montana are as follows:

> The citizen groups chose the initiative route with I-122 because the people in those groups believed that the corporate lobbyists had such influence at the Montana legislature that citizen voices were not being heard. In 1995 the legislature had, over strong protest from citizens, weakened the Montana water quality standards that I-122 sought to restore.
>
> I believe that the mining corporations ability to spend money from the corporate checkbook and use corporate staff and resources to oppose I-122 was the sole reason that I-122 failed. The issue failed because it was not possible for the citizen side (as organized as it was) even to come close to matching those resources. I believe that this great unfairness of use of for-profit corporate money has skewed and corrupted the ballot process to the point where it now belongs to for-profit corporations and not to ordinary people.

> The ballot process has long been part of Montana's political system. I believe it hurts the system when for-profits can spend from the corporate treasury as corporations did on I-122.

Frasier Aff. at 3-4.

Defendant Argenbright informs the court that 24 ballot measures were placed before Montana voters since 1982, and in one case there was no reported spending. Of the remaining 23 ballot measures, in 14 such elections the side that reported spending the most money prevailed. *See* Hubbert Aff. at §§ 5-7. In 11 of those 14 ballot elections, the prevailing side spent 92 percent or more of the total amount of money spent on that particular ballot measure. Intervenor points out that statistical averages are not meaningful because corporations do not always take an interest in ballot initiatives. But when they do, argues Intervenor, they almost always win with big money. C.B. Pearson, past executive director of the Montana Public Interest Research Group, past executive director of Common Cause of Montana, and co-author of "Big Money and Montana's Ballot Campaigns," Sept. 1996 (Montana Public Interest Research Foundation) (attached to C.B. Pearson's affidavit), states in his affidavit that "[s]ince the mid 1970s corporate money has done exactly what was feared in 1912 – corporate money has dominated the initiative process whenever an issue of concern to a for profit corporate entity has been placed on the ballot." Affidavit of C.B. Pearson, October 13, 1997, at. 4.

Plaintiffs assert that Rule 701, Fed. R. Evid., prohibits this court from considering the affidavits presented by Intervenor because the affidavits contain speculation by lay witnesses as to the reasons behind certain election

outcomes. Plaintiffs argue that these affiants are not qualified to testify as to what voters were thinking or why they thought as they did when they voted, making affiants' opinions inadmissible. Plaintiffs argue incorrectly that Rule 701 prohibits lay opinion testimony concerning the mental state of another. *See Bohannon v. Pegelow*, 652 F.2d 729 (7th Cir. 1981). In any event, the primary purpose of the affidavits submitted by Intervenor is not to give an expert opinion explaining and describing voting behavior but to accurately explain and describe the affiants' perceptions of voting behavior vis-a-vis the affiants' confidence in ballot issue elections generally. The correct standard to be applied to lay opinions is whether the opinion, rationally based on the perceptions of the witness, will assist the court in understanding witness testimony or in making a determination of a factual issue. Graham, *Handbook of Federal Evidence*, § 701.0 (3rd ed. 1991). In this case, the opinion testimony of the Intervenor's affiants assists the court in determining whether there is an appearance of corruption or loss of confidence among the citizenry in the ballot initiative process. The affidavits are therefore worthy of consideration in opposition to Plaintiffs' motion for summary judgment.

Based on the affidavits and studies submitted by Intervenor regarding appearance of corruption and citizen confidence in the ballot election process, and based on the opposing affidavit of Prof. Alexander, the court finds that there is a genuine issue of material fact whether on one or more occasions a Montana ballot initiative campaign has been so dominated by corporate money and media advertising as to overwhelm opposing citizen voices, to give the appearance of corruption, to

cause a distortion of Montana's political system, or to undermine citizen confidence in the ballot initiative process.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment is GRANTED as to Count VI and DENIED as to Counts I through V. As requested by Plaintiffs in Count VI of their Amended Complaint, the court declares that H.B. 575, enacted as Mont. Code Ann. § 13-35-236 (1997) and amending Mont. Code Ann. § 13-35-227 (1997), abridges First Amendment freedom of speech and association, as applied to the states through the Fourteenth Amendment, and is therefore unconstitutional and unenforceable. However, as to all other Counts the Plaintiffs' motion for summary judgment is DENIED because (1) the court finds that there is a genuine issue of material fact as to whether the regulations imposed upon corporations by I-125 are justified by the State of Montana's compelling interest in protecting the integrity of its political system and in avoiding corruption or the appearance of corruption in its ballot initiative process (Count I); (2) the court declares that I-125 is not void for vagueness (Counts II and III); (3) the court declares that I-125 does not violate Plaintiffs' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution (Count IV); and (4) the court declares that I-125 does not violate Plaintiffs' rights under the Equal Protection Clause (Count V).

IT IS FURTHER ORDERED that Count I of the Amended Complaint is set down for bench trial on Monday, May 18, 1998, at 9:30 a.m. in the main courtroom of the United States Courthouse, Helena, Montana.

The Clerk is directed to notify forthwith the parties of entry of this order.

Done and dated this 18th day of February, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION, Plaintiffs-Appellees, vs. ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, Defendant, and LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR 1-125, Defendant-Intervenor-Appellant.	No. 98-36256 D.C. No. CV-97-00006-CCL ORDER FILED FEB 20 2001
MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN	No. 98-36257 D.C. No. CV-98-00037-CCL

SUNLIGHT MINES, INC., YELLOW BAND BOLD, INC., CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT; MIKE COONEY,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS 1-125,

Defendant-Intervenor-Appellant.

MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN SUNLIGHT MINES, INC.; YELLOW BAND GOLD, INC.; CONTINENTAL LIME, INC.,

Plaintiff-Appellees,

vs.

ED ARGENBRIGHT

Defendant-Appellant,

and

No. 98-36261

D.C. No. CV-98-00037-CCL

MIKE COONEY,

Defendant,

and

LEAGUE OF WOMEN NOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor,

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant-Appellant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG

No. 98-36266

D.C. No. 97-00006-CCL

2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor.

MONTANA MINING ASSOCIATION,

Plaintiff,

and

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellants,

vs.

ED ARGENBRIGHT; MIKE COONEY,

Defendants-Appellees,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor-Appellee.

No. 99-35032

D.C. No. CV-98-00037-CCL

MONTANA MINING ASSOCIATION,

Plaintiff,

and

No. 99-35033

D.C. No. CV-97-00037-CCL

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT,

Defendant,

and

MIKE COONEY,

Defendant-Appellant.

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor.

Before: RYMER, HAWKINS, and McKEOWN, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judge Hawkins voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge called for an en banc vote, and a majority of the active judges of the court has

voted to deny the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.